In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1858

MARIA ALANIZ, et al.,
Plaintiffs-Respondents,

vs.

TILLIE LEWIS FOODS, et al.,
Defendants-Respondents,

vs.

ROBERT BEAVER, et al.,
Applicants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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I

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The United States Court of Appeals for the Ninth Circuit has delivered one opinion in the instant case. The opinion is reported at 572 F.2d 657, 16 FEP

Cases 1089 (February 1, 1978, as amended April 3, 1978).

The United States District Court for the Northern District of California has delivered three opinions in the instant case. The opinions are reported at 73 F.R.D. 269, 13 FEP Cases 720 (May 5, 1976); 13 FEP Cases 738 (July 22, 1976); and 73 F.R.D. 289, 15 FEP Cases 698 (November 11, 1976). Of these three opinions, only the last treats petitioners' motion for leave to intervene, the matter with which the instant petition is concerned.

II

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the court of appeals, of which review is sought herein, was filed and entered on February 1, 1978. On April 3, 1978, the court of appeals filed an order which amended its earlier opinion and denied petitioners' petition for rehearing.

Petitioners seek review of the court of appeals' decision in this case by way of petition for a writ of certiorari. Accordingly, this Court's jurisdiction is conferred by 28 U.S.C. §1254(1).

III

QUESTIONS PRESENTED FOR REVIEW

This petition presents the following questions for review:

A. Was petitioners' motion to intervene in this action in the district court a timely and proper one within the meaning of Federal Rule of Civil Procedure 24(a)(2)?

B. Did the district court's denial of petitioners' motion to intervene deprive them of the due process of law guaranteed to them by the Fifth Amendment to the United States Constitution?

C. Did the district court abuse its discretion by denying petitioners' motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(5) and (b)(6)?

IV

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED UPON

Federal Rule of Civil Procedure 24(a)(2) provides, in pertinent part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may

as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Federal Rule of Civil Procedure 60(b)(5) and (b)(6) provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

V

STATEMENT OF THE CASE

A. The Lawsuit In Chief

This action was brought in the United States District Court for the Northern District of California on December 3, 1973, pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.),

to redress an alleged pattern or practice of discrimination against women and minorities in 74 food processing and canning plants located in Northern California. Jurisdiction was conferred on that court by Title VII of the Civil Rights Act of 1964 [42 U.S.C. §2000e-5(f)] and 28 U.S.C. §1343(4). (CR 001-018).

The plaintiffs were represented in the litigation by the Mexican American Legal Defense & Educational Fund. Defendants consisted of the canneries, their collective bargaining agent California Processors, Inc., 13 local Teamsters unions which represent the cannery workers in collective bargaining, and the California State Council of Cannery and Food Processing Unions, which is the authorized bargaining agent for the local unions.[1]

During the action's pendency, the parties engaged in conciliation with the Equal Employment Opportunity Commission (EEOC), which culminated in a Conciliation and Settlement Agreement (hereinafter the "Agreement", "Consent Decree", or "Decree") finalized by the parties on March 12, 1976 (CR 907-958), after several days of hearing before the district court. On May 5, 1976, the district court, in a lengthy opinion (CR 976-1013, Appendix C), approved the

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[1]The canneries and their agent California Processors, Inc. are hereinafter referred to collectively as "companies", and California Processors, Inc. is referred to separately as "CPI." The local unions and their agent California State Council of Cannery and Food Processing Unions are hereinafter referred to collectively as "union", and California State Council of Cannery and Food Processing Union is referred to separately as "council".

Consent Decree and certified the action as a class action while retaining jurisdiction over the Agreement's enforcement.

Between April and June 1975, separate groups of members from the plaintiff class, i.e., women and minority employees, had attempted to intervene in the action. While the applicants (hereinafter described as "pre-decree intervenors") were allowed to participate in subsequent proceedings, the district court ultimately denied them intervention. (CR 1048-1050). The pre-decree intervenors then appealed that denial on April 30, 1976. (CR 971).

In its May 6, 1976 opinion, the district court set out a capsule summary of the facts in the case as reflected in the structure of the canning industry of Northern California. (CR 991-993). Petitioners hereby incorporate that summary by reference (see Appendix C hereto, at 25 through 28).

One crucial fact not discussed by the court in the May 5, 1976 opinion is the lack of discriminatory impact of the policies described. Although the court recites that "[f]emales are estimated to constitute some 58% of the present peak-season work force; the percentage of minority workers in the peak-season work force is estimated at 62%" (CR 991, Appendix C at 26), comparative data is lacking. First, there is no indication of the composition of the off-season industry, and second, there is nowhere a description of what the industry would look like in the absence of the alleged discrimination. In fact, *the*

plaintiffs and the defendants actually agreed that there was no actionable discrimination in the canneries to begin with.[2]

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[2]As the plaintiffs and the defendants agreed in jointly urging the district court's approval of the settlement over the objections of the pre-decree intervenors that the relief was inadequate:

> Females currently hold 25% of the high bracket jobs. Females and minorities together hold 69% of the high bracket jobs. Under these conditions, the existence of a *prima facie* case becomes extremely problematical. (CR 700).
>
> Those statistics show it is highly unlikely that there exists a *prima facie* case of discrimination based on race or ethnic origin, and that it is problematical that a *prima facie* case exists on sex. Moreover, even if a *prima facie* case is assumed for females, the monetary expense of defendants is limited significantly by the number of openings during the last five years. (CR 697).
>
> The employment statistics for the industry broken down for high bracket and mechanics' jobs by race, ethnic origin and sex show that minorities presently hold 55% of the high bracket jobs and 52% of the mechanics' jobs. These percentages are almost twice the minorities' share of the population. In addition, minorities comprise 44% of high bracket jobs in Brackets I and IA and 27% of Brackets I and IA mechanics' jobs. Thus, at the highest paying job, minorities are at or far above parity in the industry as a whole. (CR 697).
>
> In short, the Intervenors' initial concession that the overall level of employment of Mexican-American men at all levels indicates no *prima facie* case should be this court's conclusion. (CR 855:19).

And, as to the class of female employees, the same parties argued:

> The canneries have awarded 24.3% of all regular positions to women during the time frame contended by the Intervenors to be appropriate, 1970 to date.
>
> • • •
>
> What is significant about the 24.3% figure is how close it comes to the 30% figure contended appropriate by the EEOC. We are unaware of any court that has found classwide discrimination based on such a statistical comparison. (CR 856:9-31).

Furthermore, the *plaintiffs* argued that they ". . . have, throughout this litigation, stated to the court that many of these women *choose* not to work in the higher bracket jobs and not to work year round." (CR 1118:11-14; emphasis added).

Incredibly enough, although the district court agreed with this assessment (CR 1010, Appendix C at 49) it nevertheless approved the settlement and entered it as a consent decree. Among other things, it conferred the following relief upon "affected class members":

(1) Extensive "remedial" seniority (CR 921-927);

(2) Abolition of the "incumbency rule;"[3]

(3) Special training programs (CR 926); and

(4) "Compensatory" pension credits (CR 1283-1284) without requiring any additional pension contributions by the companies (CR 930).

B. Petitioners' Motion To Intervene

On June 15, 1976, the Consent Decree became effective and the implementation of the Agreement commenced. (CR 970).

Prior to that time, petitioners were completely unaware that this litigation placed their employment status in jeopardy.

On October 28, 1975, the district court had ordered that notice be given *only* to the class members by publication, by individual mailings, and by postings in the canneries (CR 550-551). However, although the order required publication for at least three weeks in newspapers of general circulation, the notice

[3]The district court described the incumbency rule as "a tacit understanding under which the holder of a job in the previous season supposedly got preference for that position upon recall at the beginning of the peak season, regardless of seniority." (CR 994-995).

in fact was published on only one day in legal journals of very limited circulation (Document #185 in the clerk's record on appeal, contained in an envelope of non-reproducible documents). The notices mailed to the class members contained only "a very general description" (CR 554) of the Agreement's seniority provisions, a description so oblique that it escaped even the very diligent attorneys for the pre-decree intervenors (CR 825-826). As best petitioners have been able to determine, no postings were made at all in the canneries.

Although the lawsuit and its anticipated settlement were the subjects of newspaper publicity, prior to the end of May of 1976 the only reference to their effect on seniority was a statement by one of plaintiffs' attorneys that there would be none. ("Appendix A" to plaintiffs/appellees' brief on appeal).

In fact, petitioners' ignorance was the product of a deliberate scheme to conceal from them the true nature of the settlement. As is shown by the *unrebutted* affidavits of union officials, submitted by petitioners with their motion to intervene in the action:

> . . . we were . . . told by the Secretary Treasurer of the Council that when we returned to our locals, we should not discuss the proposed Conciliation Agreement until the negotiations are finalized. (Affidavit of Ronald R. Ashlock, President of Teamsters Union Local 748 from September of 1972 to September of 1975; CR 1227).
>
> At Council meetings I have been told by Messrs. Tayer, Bodine, Sanchez, and Elorduy that we were not to reveal the substance of the proposed

conciliation agreement until after it was finalized.[4] (Affidavit of Harold Hicks, Secretary-Treasurer of Local 748 from September of 1972 to September of 1975; CR 1229).

As is further shown by petitioners' own *unrebutted affidavits,* those of them who did inquire were told by union officials, as late as May of 1976, that the Agreement would have no effect whatsoever on their seniority system (CR 1094, 1096, 1219, 1221, 1222, 1226-1233).

Contrary to these assurances, the implementation of the Agreement on June 15, 1976, resulted in a drastic reshuffling of jobs, alteration of existing seniority and actual layoffs both for Anglo males and for females and minorities not graced with favored status under the decree. (CR 1094-1105, 1223-1224, 1232, 1234-1248, 1264, 1276-1293). Job dislocation and displacement will continue as the Agreement is further implemented. (CR 1248; RT 7/9/76, Vol. VIII, 24:14-16, 29:22-30:6, 33:3-5, 33:20-34:3, 34:18-35:22, 45:3).

When the jeopardy they faced was finally brought home to them, petitioners immediately sought legal counsel. On July 2, 1976, they filed their motion to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2). As a class, petitioners constitute a large group of cannery workers who believe that the

[4]The term "Council" refers to the Teamsters California State Council of Cannery and Food Processing Unions. (CR 910). Messrs. Tayer and Bodine are attorneys for the Council in this action. Mr. Sanchez is President of the Council; Mr. Elorduy is Secretary-Treasurer of the Council. (CR 952).

Agreement is grossly unfair and illegal, and many of whom have been adversely affected by its operation. (CR 1093:10-17; RT 7/9/76, Vol. VIII, 20:17-21). Their class is comprised of minority and Caucasian males and females.

Contemporaneously with their motion to intervene, petitioners moved for a stay of implementation of the Agreement and relief from the judgment. The district court heard the motions, and found petitioners' to be ". . . a proper case, I would think, for intervention, I don't question that." Nevertheless, it denied the motions on the erroneous ground that it had been divested of jurisdiction by the pre-decree intervenors' appeal. (RT 7/9/76, Vol. VIII, 7:14-16, 8:15-17, 10:17-19; RT 7/12/76, Vol. IX, 12:21-23).

Disagreeing with the court's jurisdictional position, Applicants appealed the denial of their motions and moved for leave to intervene in the pre-decree intervenors' appeal. (CR 1267).

On July 6, 1976, the defendants, with the support of the pre-decree intervenors, moved the lower court for a declaratory order which would have had the effect of substantially altering the Decree. (CR 1051). Once the plaintiffs' consent was obtained through negotiation, the Agreement was amended by a stipulation which was presented to the court on September 22, 1976, and which became effective September 29, 1976. (CR 1309). The stipulation's most substantive amendment of the Agreement concerned the change from a formulaic seniority system to a seniority sys-

tem essentially defined by date of hire, pursuant to which retroactive seniority was granted which in many cases pre-dated the effective date of Title VII by many years. CR 1056, 1285, 911).

In reliance on the district court's prior statement as to the propriety of their motion to intervene, and to satisfy the court's jurisdictional qualms, petitioners also dismissed their appeal and renewed their motions. (CR 1311). On September 22, 1976, the court again heard petitioners' motions and on November 11, 1976, by written opinion, denied their motion to intervene on the grounds of untimeliness and adequacy of representation. (CR 1322, 1323).

Believing the court to have abused its discretion and to have erred in its ruling as a matter of law, petitioners filed a notice of appeal on December 9, 1976. (CR 1324). The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision, though it did so solely on the issue of timeliness (Appendix A).

VI

ARGUMENT

Petitioners submit that the court of appeals' affirmance of the district court's denial of petitioners' application for intervention meets two of the considerations governing review on certiorari which are set forth in Rule 19 of this Court's rules. First, the court of appeals' decision herein is directly in conflict

with the Fifth Circuit's decision in the remarkably similar case of *Stallworth v. Monsanto Co.* (5th Cir., 1977) 558 F.2d 257. Second, the court of appeals' decision conflicts with this Court's decision in *United Air Lines, Inc. v. McDonald* (1977) ..... U.S. ....., 97 S.Ct. 2464.

A. PETITIONERS ARE ENTITLED TO INTERVENE IN THIS ACTION AS A MATTER OF RIGHT UNDER FEDERAL RULE OF CIVIL PROCEDURE 24(a)(2)

1. Petitioners' Application Was Timely

Stallworth, supra, was an employment discrimination action by black employees which challenged, among other things, the defendant company's use of a departmental seniority system. Although the defendant had pointed out to the court that the seniority relief being sought would have a substantial adverse effect on the seniority rights of both black and white incumbents and had asked permission to notify them of the risk, permission was denied. As in the instant case, seniority relief of the merger type was granted which in fact displaced many incumbents. The order granting relief was entered on March 7, 1975, and implemented ten days later. The appellants' motion to intervene was filed on April 4, 1975. As here, the district court denied the motion as untimely, finding that the appellants must have known of the lawsuit's pendency at some unspecified time prior to the filing of their motion and that they had presented no excuse for their delay. In reversing, the Fifth Circuit carefully examined Rule 24 (a)'s requirement of timeliness and set forth a four-

part test for determining the timeliness of applications for intervention which are made as a matter of right. These four elements are:

> Factor 1. The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene.
>
> Factor 2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.
>
> Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.
>
> Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely. *Id.*, 558 F.2d at 264-266.

Although the petitioners cited the *Stallworth* case to the court of appeals herein, the court's opinion ignores it.

As will be shown, petitioners' application here met every element of the *Stallworth* test. It will also be shown that the court of appeals' decision herein conflicts with the Fifth Circuit's at every turn.

The first factor in the *Stallworth* test is the length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to

intervene. *Id.*, at 264, citing *United Air Lines, Inc. v. McDonald* (1977) ..... U.S. at ....., 97 S.Ct. at 2469.

As the *Stallworth* court held and as is implicit in *United Air Lines,* knowledge of the pendency of the lawsuit, without knowledge that the would-be intervenor's interests are in jeopardy, does not start the "clock" which measures the timeliness of the application. *Stallworth, supra,* 558 F.2d at 264-265, *United Air Lines, supra,* ..... U.S. at ....., 97 S.Ct. at 2470. To the contrary, these cases stand for the proposition that an intervenor's diligence will be measured only from the time that he knew or reasonably should have known of the threat.

Here, petitioners had no inkling that their interests were involved in this lawsuit until the new seniority lists, altered by the Consent Decree, were posted in the canneries on June 15, 1976. In light of the assurances from their union, it cannot reasonably be said that they should have discovered their peril prior to then. Upon this discovery, however, they immediately sought counsel and filed their motion to intervene on July 2, 1976, *only seventeen days later.* As in *Stallworth,*

> It cannot be said that they ought to have fathomed the potential impact of this admittedly complex case on their seniority rights at some earlier date. Nor did the appellants dawdle when they discovered that their interests might be affected by this litigation. By filing their petition less than one month after learning of their interest in this case, the appellants discharged their duty to act quickly. *Id.*, 558 F.2d at 267.

By contrast, in deciding the instant case the court of appeals relied heavily on the length of the action's pendency and the fact that a consent decree had been entered (Appendix A at 4). In doing so, it cited *Commonwealth of Pennsylvania v. Rizzo* (3d Cir., 1976) 530 F.2d 501, cert. den. 96 S.Ct. 2628, *McClain v. Wagner Electric Corp.* (8th Cir., 1977) 550 F.2d 1115, *Teseyman v. Fisher* (9th Cir., 1955) 231 F.2d 583, and *Nevilles v. EEOC* (8th Cir., 1975) 511 F.2d 303, all of which are readily distinguishable from the case at bar.

In *Rizzo, supra,* the application for intervention was found to be untimely where it was filed more than six months after the entry of a preliminary injunction which directly affected the applicants and therefore apprised them that their interests were at stake. *Id.,* at 507.

The *McClain* opinion adverted to the length of time which had elapsed (an "absolute" rejected by *Stallworth, supra,* 558 F.2d at 266), but turned on the fact that the movant had filed his application in the wrong lawsuit. *McClain, supra,* 550 F.2d at 1121.

Teseyman, supra, involved an application by one who had been involved as a party in much prior litigation over the same property with which the subject lawsuit was concerned. His application was filed nine months after the commencement and more than two weeks after the trial of the subject lawsuit, at which he had testified. *Teseyman, supra,* 231 F.2d at 584.

In *Nevilles, supra,* the would-be intervenor had relied in the district court and at oral argument on appeal only upon the fact that she had not received formal notice of the action and did not allege there that she did not know of the action or its potential impact upon her. The Eighth Circuit found that the district ccurt could reasonably have determined that the movant had failed to allege and prove the lack of actual knowledge of the suit during its pendency, which would have justified the delay. *Nevilles, supra,* 511 F.2d at 306.

In reaching its conclusion in this case with respect to timeliness, the court of appeals referred to the notice of the action which was allegedly given to class members, pointed to petitioners' assertion that they did not know that the settlement would be to their detriment, and concluded that ". . . surely they knew of the risks." (Appendix A at 4). First, it should be remembered that many of petitioners were not class members and did not receive the notices which were mailed out. Second, as has been explained above and as was demonstrated in detail to the court of appeals, the notice which was given was wholly inadequate to apprise petitioners of the risks they faced. Third, the court of appeals ignored petitioners *unrebutted proof* of the deceit worked upon them by their union's assurances that they would not be prejudiced.

Petitioners took action as soon as they learned of the harm worked upon them by the Consent Decree.

They submit that they cannot reasonably be expected to have acted any sooner than they did.

The second factor in the *Stallworth* timeliness test examines the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case. *Stallworth, supra,* 558 F.2d at 257, citing *United Air Lines, supra,* ..... U.S. at ....., 97 S.Ct. at 2470. Based upon a comparison of the prejudice provision of Rule 24(b) with the absence of such a provision in Rule 24(a), the Fifth Circuit concluded that it is incorrect to take into account *any* prejudice which intervention could work upon the existing parties, as the Eighth Circuit had done in *McClain, supra.* As had the *McClain* court, the court of appeals herein exaggerated the prejudice factor by viewing it from the date of its own decision.

In the instant case, petitioners sought counsel and moved for intervention immediately upon learning of the harm which the parties had inflicted on them, and in light of the circumstances it cannot be said that they should have known of the risk any earlier than June 15, 1976. Accordingly, under the *Stallworth* test, there is no prejudice to the existing parties which can weigh against petitioners' application.

The third factor in the *Stallworth* test is the extent of the prejudice that the would-be intervenor may

suffer if intervention is denied. *Stallworth, supra,* 558 F.2d at 265. In the instant case, the court of appeals never considered the question. Here, the prejudice suffered by petitioners is as wrenching as it is unconscionable, for many of them have lost their jobs, many more have lost their seniority, and many have been deprived of their yet nonvested pensions as a result of the implementation of the Consent Decree. Nor can petitioners in another proceeding, undo the harm unlawfully wrought by the decree, for such an action would be a collateral attack. *Stallworth, supra,* 558 F.2d at 268, *EEOC v. American Telephone & Telegraph Co.* (3d Cir., 1974) 506 F.2d 735, 741-742, *McAleer v. American Telephone & Telegraph Co.* (D.D.C. 1976) 416 F.Supp. 435, 440.

The fourth factor in the *Stallworth* test is the existence of unusual circumstances militating either for or against a determination that the application is timely. *Stallworth, supra,* 558 F.2d at 266. In the instant case, petitioners' *unrebutted affidavits* proved both the scheme and the effect of their union's concealment of the terms of the degree prior to June 15, 1976, the date of its implementation. This deceit, and its effect of lulling petitioners into inaction, is certainly within the scope of the unusual circumstances contemplated by the *Stallworth* court.

Petitioners are at a loss to know what better proof they could have offered so as to avoid the court of appeals' finding that they ". . . have not proved fraudulent concealment." (Appendix A at 4). Their

proof was both clear and uncontroverted by either the parties or the district court itself. They can only conclude that the court of appeals would subject them to a form of "Catch-22," i.e., in order to prove fraud they must have their day in court, but to get their day in court they first must prove the fraud.

With respect to those of petitioners who were members of the plaintiff class, the court of appeals' decision directly conflicts with this Court's holding in *United Air Lines, supra.* As in *United Air Lines,* the class-member petitioners had every right to rely on the representative plaintiffs to protect their interests until they learned of their betrayal on June 15, 1976. Particularly in light of the inadequacy of the notice given, it is difficult to understand the court of appeals' conclusion that these people ". . . surely . . . knew the risks."

Petitioners submit that their application was a timely one, and that the district court abused its discretion in finding otherwise, particularly after having previously found their application to present ". . . a proper case for intervention."

2. Petitioners' Interests In The Subject Matter Of The Litigation Are Sufficient For Intervention

Petitioners have three primary contractual interests which have been done violence by this litigation: (1) their interests in their seniority, (2) their interests in keeping their jobs, and (3) their interests in their pensions.

First, with respect to seniority, this Court has pointed out that " 'competitive status' seniority 'has become of overriding importance. . . .' 'More than any other provision of the collective [bargaining] agreement . . . seniority affects the economic security of the individual employee covered by its terms.' " *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747, 766, 96 S.Ct. 1251, 1265 citing *Humphrey v. Moore* (1964) 375 U.S. 335, 346-347, 84 S.Ct. 363, 370. More recently, in *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 97 S.Ct. 1843, this Court resurrected Section 703(h) of Title VII [42 U.S.C. §2000e-2(h)], which protects bona fide seniority systems from judicial tampering where they are not the result of an intention to discriminate. Petitioners submit that such recognition by this Court of the importance of seniority rights, without more, is sufficient to establish that such interests are substantial enough to warrant intervention where they are threatened. Here, petitioners' seniority interests were not simply threatened—they actually were taken away by the operation of the Consent Decree.

Second, with respect to petitioners' interests in keeping their jobs, decisions of this Court have established that continuing employment is a property interest within the meaning of the Fifth and Fourteenth Amendments' Due Process clauses which cannot be divested through arbitrary state action. *Weiman v. Updegraff* (1952) 344 U.S. 183, 73 S.Ct. 503, *Perry v. Sindermann* (1972) 408 U.S. 593, 92 S.Ct. 2694, *Board of Regents of State Colleges v. Roth*

(1972) 408 U.S. 564, 92 S.Ct. 2701. If such interests are sufficiently important to warrant constitutional protection, they are no doubt important enough to justify intervention in litigation which jeopardizes them. Again, the fact that the operation of the Consent Decree actually took jobs away from many of the petitioners demonstrates the substantiality of their interests in this lawsuit.

Third, petitioners' pension interests were similarly given away in secret by their union and their employers in their haste to settle this lawsuit as quickly and cheaply as possible. By giving "remedial" pension credits to "affected class members" while providing that the gift would not require additional employer pension contributions, the Consent Decree necessarily has diluted the fund to which petitioners look for their pensions—at least those among petitioners who have not lost their jobs prior to the vesting of their pension rights.

Congress found employees' interests in the integrity of their pension plans to be so great as to mandate the passage of the Employee Retirement Income Security Act ("ERISA," 29 U.S.C. §§ 1001, et seq.). As is reflected by Section 2 of ERISA (29 U.S.C. §1001), the substantiality of these interests is beyond dispute. Petitioners submit that the dilution of these interests by the operation of the Consent Decree forms a third, independently sufficient ground for intervention.

3. Petitioners Are So Situated That The Disposition Of This Action Will, As A Practical Matter, Impair And Impede Their Ability To Protect Their Interests

Although the court of appeals stated that those of petitioners who are members of the lawsuit's original class are bound by the decree (Appendix A at 2), petitioners believe that the question is by no means easily answered in light of the defective notice which was given. If they are so bound, then this fact alone satisfies the impairment element of Rule 24(a). 3B *Moore's Federal Practice,* ¶ 24.09-1[3], at 24-312.

But as a practical matter, such technical impairment pales by comparison with the fact that petitioners' work environment is completely controlled by the parties to the lawsuit and by the operation of the decree. What petitioners want, and are entitled to, is to have their jobs, their seniority and their pension rights returned to them.

Although petitioners probably could bring an action for damages, such damages are only "rough justice" since ". . . it may well be impossible to compensate plaintiff fully for the injury he has incurred." *McAleer v. American Telephone and Telegraph Co.* (D.D.C. 1976) 416 F.Supp. 435, 440. Were money damages sufficient to compensate the unlawful deprivation of employment, the injunctive provisions of Title VII [42 U.S.C. §2000e-5(g)] and the Labor-Management Relations Act [29 U.S.C. §160 (c)] would have no rationale.

The only way for petitioners adequately to protect their legitimate interests in their jobs is to intervene

in this action for relief from the injustice which has been done to them.

4. Petitioners' Interests Have Not Been Adequately Represented By The Existing Parties To This Lawsuit

Although petitioners bear the burden of proving inadequate representation, this Court pointed out in *Trbovich v. United Mine Workers* (1972) 404 U.S. 528, 538, footnote 10, that the requirement is satisfied ". . . if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated *as minimal.*"

Here, the record is so replete with examples of the union's failure to protect petitioners' interests that it far transcends the minimality requirement of *Trbovich, supra.* Nowhere in the record is there the faintest hint of union concern for petitioners' interests. Nowhere did the union question the propriety of its giving away petitioners' seniority or pension rights. Nowhere did the union suggest that petitioners be joined as parties to the action, as has been done in other cases such as *Kaplan v. I.A.T.S.E. Local 659* (9th Cir., 1975) 525 F.2d 1354, 1361, *English v. Seaboard Coast Line R R Co.* (5th Cir., 1972) 465 F.2d 43, 47, or *Banks v. Seaboard* (N.D. Ga. 1970) 51 F.R.D. 304, 305. And nowhere did the union even suggest that notice be given to the petitioners who were not class members and who stood to lose the most, as is suggested in *Mandujano v. Basic Vegetable Products, Inc.* (9th Cir., 1976) 541 F.2d 832, 837, and as is required by *Schroeder v. City of New York* (1962) 371 U.S. 208, 211.

To the contrary, the union sought to conceal and did conceal its giving away of petitioners' employment rights by the outright deceit which petitioners have proved and which the union has neither rebutted nor even denied.

Petitioners submit that such proofs far exceed the standard set forth in *Trbovich, supra.*

B. THE DISTRICT COURT'S FAILURE TO ORDER GENUINE NOTICE TO ALL CANNERY EMPLOYEES VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 70 S.Ct. 652, is the starting point for any discussion of what "process is due" under the Due Process Clauses. The Court there set forth two prerequisites before notice will be required. First, "life, liberty or property . . ." must be involved and second, there must be a proceeding wherein the interests enumerated "may be" deprived. *Id.,* 339 U.S. at 313, 70 S.Ct. at 656-657.

The interest which petitioners have in their seniority rights has been held to constitute property despite the fact that it may be altered through collective bargaining. *Primakow v. Ry. Express Agency, Inc.* (E.D. Wis. 1943) 56 F.Supp. 413. Further, many of the petitioners have in fact lost their jobs by the operation of the Consent Decree. Because the provisions of the decree allow the claiming of any job at the beginning or the season, without any protection for the incumbent workers, the decree goes much further than merely affecting "expectations." It

reaches the *current* employment security of the incumbents.

In *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 92 S.Ct. 2701, this Court held that as long as one's claimed entitlement to continued employment is not "a unilateral expectation," employment is a property right that the state cannot arbitrarily revoke. *Id.*, 408 U.S. at 577, 92 S.Ct. at 2709. In the companion case of *Perry v. Sindermann* (1972) 408 U.S. 593, 602, 92 S.Ct. 2694, 2700, the Court noted that "[e]xplicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.'" [citation omitted]. The explicit contractual seniority system under which the cannery employees had been working, supplemented by the "tacit agreement" of the incumbency rule, establishes petitioners' property interest in their employment of which they were deprived without notice and an opportunity to be heard.

In addition to petitioners' property interests in their seniority system and their employment status, they have been deprived of a significant property interest in their pension program without notice and an opportunity to be heard.

Under California law, "[p]ension rights, whether or not vested, represent a property interest." *In Re Marriage of Brown* (1976) 15 Cal.3d 838, 842-843; *Miller v. State* (1977) 18 Cal.3d 308, 135 Cal.Rptr. 386. In this case, the employees who have had contributions made to their pension program on the basis of the

number of hours they have worked will see the fund thus created severely diluted by the double pension credits allowed by the decree.

Clearly, then, Applicants have legitimate property interests in their seniority system, their jobs and their pension plans. In order to comply with the requirements of due process where legitimate property interests are at stake, it is necessary for the court to ensure

> . . . notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Schroeder v. City of New York* (1962) 371 U.S. 208, 211.

Here, the only notice issued under the lower court's auspices was designated *not* to apprise petitioners of the pendency of the action.

Because petitioners were not notified in a manner reasonably calculated to apprise them of the pendency of the action, and in fact did not know that their interests were at stake, they were deprived of an opportunity to bring the unfairness and illegality of the decree to the court's attention. They were thereby deprived of their day in court, and deprived of their property interests without due process of law.

C. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING PETITIONERS' MOTION FOR RELIEF FROM JUDGMENT UNDER RULE 60(b)

Although Rule 60(b) contemplates motions by parties, and petitioners are not parties *per se* to this litigation, where a legitimate cause for concern is brought

to the attention of the court through a motion to intervene, the court, in its discretion, may treat the applicant as an *amicus curiae,* and provide the relief necessary on its own motion. *United States v. International Tel. & Tel.* (D.C. Conn. 1972) 349 F.Supp. 22. Here, legitimate cause for concern over the inequity of the Consent Decree plainly exists. By refusing to take action when confronted with the gross inequities generated by its decree, the district court abused its discretion.

In considering the application of Rule 60(b) to a consent decree, Justice Cardozo observed in *United States v. Swift & Co.* (1932) 286 U.S. 106, 115:

> The result is all one whether the decree has been after litigation or by consent. [citation omitted]. In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.

Here, it is no longer equitable that the Consent Decree should have prospective application. The denial of petitioners' motion should be reversed.

VII

CONCLUSION

The essence of petitioners' argument is very simple. They have been deprived of their livelihoods without so much as an opportunity to have a say in the determination. They ask for little more than the most basic element of justice, the right to be heard.

In July, 1976, petitioners moved the lower court for the right to intervene as soon as they could have been expected to do so. They were rebuffed because, through no fault of their own, but rather through the parties' secrecy, they had not perceived the danger to themselves early enough for the courts below. No matter that they did not know of the lawsuit's potential impact on their lives; no matter that they were deceived; no matter that they were claiming intervention of right; no matter that the decree which they sought to affect was amended while they were forced to watch from the sidelines. It is petitioners' hope that this Court will recognize that the circumstances of this lawsuit *are* important.

Petitioners are working individuals who do not possess large amounts of material goods. Their interests in their livelihoods, however, are of immeasurable value to them. As concomitants of their livelihoods, petitioners have an interest in their seniority system, in their jobs, and in their retirement benefits. Any one of these interests is of sufficient import to warrant their intervention. Together, they provide compelling justification for it.

Because of the peculiar position employment holds in the American ethic, it is difficult to conceive of an adequate substitute for one's job and employment security. Without leave to intervene in this lawsuit, petitioners will be unable to adequately protect the interests they have held.

Intervention will have no deletrious effect on the parties to the lawsuit. Only to the extent that the

private game which they were wrongfully playing with petitioners' assets would then be opened will they be affected at all.

The inequities of this lawsuit are astounding. Those inequities were brought to the attention of the district court, yet it denied petitioners' motion for intervention and relief from judgment. Petitioners respectfully request that this Court grant a writ of certiorari to review the district court's abuses of discretion and the court of appeals' error in affirming those abuses.

Dated: June 27, 1978

Respectfully submitted,
JAMES E. MILLER,
JOHN J. DAVIS, JR.,
McCARTHY, JOHNSON & MILLER,
Attorneys for Petitioners.

(Appendices Follow)

Appendices

Appendix A

In the United States Court of Appeals
for the Ninth Circuit

Maria Alaniz, et al., Plaintiff-Appellee, vs. California Processors, Inc., Defendants-Appellants.	No. 76-2843
Maria Alaniz, et al., Plaintiff-Appellee, vs. Tillie Lewis Foods, et al., Defendants, Robert Beaver, et al., Applicant-Intervenors Appellant.	No. 77-1156

[Filed Feb. 1, 1978]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: WRIGHT and ANDERSON, Circuit Judges, and WHELAN,* District Judge

PER CURIAM:

To protect their seniority, appellants, a group of cannery employees, sought intervention in a class

*The Honorable Francis C. Whelan, United States District Judge for the Central District of California, sitting by designation.

action instituted December 3, 1973, by minorities and women to rectify alleged discrimination in the Northern California canning industry.[1] Defendants were the plaintiffs' unions and employers. The motion to intervene was filed July 28, 1976, seventeen days after a consent decree had become effective. Due to an appeal which temporarily deprived the court of jurisdiction, the court delayed its ruling. The appeal was dismissed and the decree modified before September 22, 1976, when appellants' motion was heard again. On November 11, 1976, the district court denied intervention because the motion was untimely. 73 F.R.D. 289 (N.D. Calif. 1976).

While we believe the district court was correct, we take this occasion to emphasize the applicable considerations where, as here, the motion to intervene was filed after the entry of a consent decree which was preceded by extensive, well-publicized industry-wide negotiations.

The primary issue on appeal is: Did the district court abuse its discretion in ruling that the motion was untimely? We find no abuse of discretion and affirm.

The question of timeliness is addressed to the sound discretion of the trial court and will be overturned only when an abuse of discretion is shown. *N.A.A.C.P. v. New York,* 413 U.S. 345, 366 (1973). Intervention after entry of a consent decree is reserved for exceptional cases. *U.S. v. Blue Chip Stamp Co.,* 272 F.Supp. 432, 435-38 (C.D. Cal. 1967), *aff'd* 389 U.S. 580 (1968). Intervention of right motions, however, should be treated more leniently than permissive intervention motions because serious harm is more likely. Wright and Miller, *Federal Practice and Procedure* § 1916 (1972).

[1]Some of the appellants are members of the original class and are therefore bound by the decree.

Three factors are usually weighed in determining timeliness:

(1) the stage of the proceeding;

(2) prejudice to other parties; and

(3) the reason for and the length of the delay.

See Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501, 506 (3rd Cir. 1976), *cert. denied,* 96 S.Ct. 2628 (1976); *McClain v. Wagner Electric Corp.,* 550 F.2d 1115, 1120 (8th Cir. 1977).

Since the motion was filed after the consent decree was approved, the first factor weighs heavily against appellants. *See Tesseyman v. Fisher,* 231 F.2d 583 (9th Cir. 1955).[2] In evaluating the second factor, courts have emphasized the seriousness of the prejudice which results when relief from long-standing inequities is delayed. Here, the decree is already being fulfilled; to countermand it now would create havoc and postpone the needed relief. Thus, to prevail appellants must convincingly explain their delay. *See*

[2]This is especially true when the applicants desire to relitigate issues already determined. *See McDonald v. E.J. Lavino Co.,* 430 F.2d 1065 (5th Cir. 1970).

Nevilles v. E.E.O.C., 511 F.2d 303 (8th Cir. 1975). This they have failed to do.

Appellants sought intervention two and one-half years after suit was filed; they either knew or should have known of the continuing negotiations.[3] The crux of appellants' argument is that they did not know the settlement decree would be to their detriment. But surely they knew the risks. To protect their interests, appellants should have joined the negotiations before the suit was settled. Since appellants have not proved fraudulent concealment, it is too late to reopen this action. *See Harper v. Kloster,* 486 F.2d 1134, 1137 (4th Cir. 1973).

Inasmuch as appellants' application for intervention was properly denied, they are without standing to litigate the merits of the decree. *Commonwealth of Pennsylvania v. Rizzo,* 530 F.2d at 508. Therefore, appellants' other arguments are to no avail.

The order denying intervention is AFFIRMED and the appeal is DISMISSED.

[3]Individual notices were mailed to class members, notices were posted at the plant; six days of hearings were held; newspapers reported the events; and the cannery employees undoubtedly discussed the possible effects the lawsuit might have. *See Mandujano v. Basic Vegetable Products, Inc.,* 541 F.2d 832, 837-41 (9th Cir. 1976) (Trask, J., dissenting).

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 77-1156

Maria Alaniz, et al.,
Plaintiffs-Appellees,
vs.
Tillie Lewis Foods, et al.,
Defendants-Appellees,
vs.
Robert Beaver, et al.,
Applicants-Appellants.

[Filed Apr. 3, 1978]

ORDER

Before: WRIGHT and ANDERSON, Circuit Judges, and WHELAN,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has

*The Honorable Francis C. Whelan, United States District Judge for the Central District of California, sitting by designation.

requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. The per curiam opinion of February 1, 1978 (West's Slip Opinions) is amended as follows:

1. Page 328, line 9, first column, the date "July 28, 1976" is changed to "July 2, 1976."
2. Page 329, line 5, second column, the sentence beginning "Since appellants have not . . ." is stricken and in lieu thereof the following is inserted:

   "Appellants have not proved fraudulent concealment. It is too late to reopen this action. *See Harper v. Kloster,* 486 F.2d 1134, 1137 (4th Cir. 1973)."

Appendix C

United States District Court
Northern District of California

No. C-73-2153 WHO

Maria Alaniz, et al.,
Plaintiffs,
vs.
California Processors, Inc.,
Walnut Creek, CA, et al.,
Defendants.

[Filed May 5, 1976]

OPINION

De Tocqueville, almost one hundred fifty years ago, in his celebrated comment, said "Scarcely any political question arises in the United States that is not resolved sooner or later, into a judicial question".[1] Today, any economic and/or social question becomes a political question and almost invariably is resolved into a judicial question. De Tocqueville's oft-quoted observation could scarcely be better illuminated than by an exposition of the facts of this case.

Here, the Court, without expertise of its own, is called upon to approve as fair, reasonable, and ade-

[1]De Tocqueville, *Democracy in America* 280 (1956 ed.).

quate a Conciliation and Settlement Agreement (the Agreement) affecting working conditions of thousands of workers in 74 canneries and food processing facilities throughout Northern California. The Court is required to sit, in effect, as a labor arbitrator. The purpose of this Opinion is not only to discuss the reasons for finding the Agreement fair, reasonable, and adequate and for certifying a class of 150,000, but also to illuminate the procedure followed in the hope that it may assist other district judges faced with the same task.

I. THE LITIGATION

Plaintiffs, representing a class of female and minority cannery workers, bring this action pursuant to Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. §2000e, et seq.) and the Civil Rights Act of 1866 (42 U.S.C. §1981) seeking relief from the defendants' allegedly unlawful employment practices. In essence, the amended complaint charges that the defendants, the employers and unions of some 74 food processing and canning plants in Northern California and their industry-wide collective bargaining agents, discriminated against the plaintiffs and the plaintiff class by denying females and minority group members opportunities to obtain higher-paying and year-round positions within the canning industry.

The principal issues presently before the Court are whether to certify a class and whether to approve a settlement reached between the parties to this litigation. The proposed settlement sets forth a compre-

hensive, industry-wide, five-year plan to remedy the effects of past discrimination against the affected class and to prevent future discrimination in the canning industry in Northern California. The settlement calls for the restructuring of seniority, job bidding, and job training provisions of the collective bargaining agreement which governs wages, terms, and conditions of employment in the industry. The proposed settlement also establishes hiring preferences and goals to insure that the basic objective of opening up higher-paying and year-round positions for females and minorities is achieved. It further provides for some $5 million in monetary relief to compensate the victims of past discrimination as well as to pay for future affirmative action obligations. For the reasons hereinafter set forth, the Court finds that the proposed settlement is fair, reasonable, and adequate and should be approved. Further, the Court certifies an industry-wide class consisting of all present, past, future, and potential bargaining unit employees and applicants for employment of member companies of California Processors, Inc. (CPI) who are Blacks, Asian-Americans, Native Americans, Spanish-Surnamed American, or females.

The complaint in this action was originally filed on December 3, 1973, and was subsequently amended on February 21, 1975. Of the 14 named plaintiffs, 12 are employees, former employees, or rejected applicants for employment of one or more of 9 defendant canneries in the greater Modesto, California area. These same 12 plaintiffs are also members or former

members of the defendant Cannery Warehousemen Food Processors, Drivers and Helpers, Local 748 (Local 748). The named plaintiffs include 5 women, 10 Spanish-Surnamed Americans, and 1 Native American. Also named as defendants in the amended complaint are over 60 additional canneries and allied operations whose food processing and canning plants are located in Northern California and 12 other local unions which represent employees at the plants of the defendant employers. The amended complaint further names as defendants the California State Council of Cannery and Food Processing Unions, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (State Council) and CPI. The State Council serves as the authorized collective bargaining agent for the 13 local unions which represent employees in the canning industry. CPI is the authorized collective bargaining agent for 29 companies which operate some 70 canning facilities in Northern California.

All the defendant employers and local unions operate under the terms of an industry-wide collective bargaining agreement negotiated by the State Council and CPI. The collective bargaining agreement in force at the time this complaint was filed is dated July 26, 1973.

The amended complaint in this action seeks declaratory and injunctive relief with respect to alleged discriminatory employment practices throughout the industry encompassed by the collective bargaining agreement. During the pendency of this private action, the defendants were also engaged in a conciliation process with the Equal Employment Opportunity Commission (EEOC). The conciliation process with the EEOC addressed substantially the same alleged discriminatory activity as this private action.

In 1974 the plaintiffs in this action were invited by the defendants to join the conciliation negotiations being conducted with the EEOC. Those combined negotiations culminated on February 19, 1975, when the parties and the EEOC entered into the Agreement. It is the Agreement which became the subject of the Court proceedings to determine its adequacy as a settlement agreement and consent decree with respect to the private class action.

On June 20, 1975, all the parties to the Agreement filed it with the Court and requested, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, that notice of the proposed settlement be sent to the settlement class.

On April 28, 1975, and again on June 13, 1975, separate groups of individuals, members of the purported class, filed motions to intervene in the instant suit, contesting various aspects of the Agreement and challenging its overall adequacy.[2]

[2]The motions to intervene were continued pending the outcome of the proceedings on the adequacy of the proposed settlement in this case. The Applicants for Intervention (Intervenors) were granted rights to fully participate in these proceedings.

II. PROCEDURE FOLLOWED IN EVALUATING THE AGREEMENT

Upon order of the Court, the matter proceeded pursuant to Section 1.46 of the Manual for Complex Litigation (the Manual). This section sets out suggested criteria and procedures for approving settlements in class actions. The Manual calls for a two-step procedure to determine whether a proposed settlement is fair and reasonable. The first step is a preliminary determination as to whether notice of the proposed settlement should be given to members of the class and a hearing scheduled at which evidence in support of and in opposition to the proposed settlement will be received. Before ordering that notice be sent out, the trial judge must be satisfied that the proposed settlement is within the range of possible approval. In essence, this determination is similar to a determination that there is "probable cause" to think the settlement is fair and reasonable.

To make this determination the Court called for briefs and affidavits from counsel for the Proponents and counsel for the Intervenors addressing the ultimate question whether the Agreement is fair and reasonable. After finally considering all briefs and affidavits and after hearing extended oral argument, the Court held the Agreement embodying the proposed settlement was within the range of possible approval. The Court then ordered notice to be prepared and sent to a tentative class for the purposes of settlement consisting of "all present, past, future and potential [bargaining unit] employees and applicants of the

[defendant employers] who are Blacks, Asian-Americans, Native-Americans, Spanish-surnamed Americans or females".

The Court then reviewed the content of the notice and procedures by which it was to be communicated to the class and found that the notice was fully adequate for purposes of the Rule 23(e) hearing, and that it was notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections". *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950).

A "Notice of Pendency of Class Action and Proposed Settlement", in both English and Spanish, was mailed to over 150,000 individuals who had been employed at any of the defendant canneries since January 1, 1970. Other measures, including newspaper publication and posting at the plants of the defendants, were undertaken to insure adequate notice to the potential class.

In preparation for the hearing on the merits of the Agreement called for by Rule 23(e) of the Federal Rules of Civil Procedure and the second step of the two-step procedure called for by Section 1.46 of the Manual, the Court permitted the Intervenors, solely for the purpose of participating in the second hearing, to enter the litigation and introduce all such evidence, oral and documentary, as they could muster after full discovery under the Rules against approving the Agreement. The Court also permitted potential class members to make statements before the

Magistrate urging approval or rejection of the Agreement. Approximately 30 of them took advantage of this opportunity.

Under Rule 706 of the Federal Rules of Evidence, the Court then appointed two impartial expert witnesses, Messrs. Sam and John Kagel. The experts received all pleadings, briefs, affidavits and other documents filed by the parties and consulted extensively with the Proponents and Intervenors.

Finally, the Court conducted six days of hearings during which evidence, both oral and documentary, was introduced. Experts on various phases of the Agreement testified for both sides. The issues were thoroughly litigated and hotly contested. Before the hearings closed, Mr. Sam Kagel, one of the court-appointed experts, testified under direct examination by the Court. Both Proponents and Intervenors then had an opportunity to cross-examine him. Further oral argument ensued, and proposed findings of fact and conclusions of law (although not required) were submitted by the parties to point out their differences after the evidence had been taken.

The Agreement, by stipulation, was amended a number of times before and during the hearings. This was done in large part by a combination of the unremitting assault of the Intervenors on certain parts of the Agreement and the statesmanlike approach of the Proponents in reasonably dealing with the Intervenors' objections.

As a result, the Agreement in its present form is far more palatable to the Court than the one considered at the first hearing. For the reasons discussed *infra*, I now certify the class, approve the Agreement as fair, reasonable, and adequate, and deny the motions of the Intervenors to intervene in this action.

III. CERTIFICATION OF THE CLASS

Initially, the Court must determine that this action should appropriately be maintained as a class action under the requirements of Rule 23 of the Federal Rules of Civil Procedure.

As noted, this Court previously permitted notice of the proposed Agreement to be distributed to potential class members. The Court also designated a tentative class for the purpose of a settlement comprised of all present, past, future, and potential employees and applicants for employment of member companies of California Processors, Inc. who are Black, Asian-Americans, Native Americans, Spanish-Surnamed Americans, or females. The Court now finds and determines that this proposed class, as more fully defined in the Court's "Notice of Pendency of Class Action and Proposed Settlement", meets the requirements of Rule 23 in that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law and fact common to the class, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties fairly and adequately protect the interests of the class.

Numerosity is no problem here since the tentative class, those to whom notice was sent, is in excess of

150,000 persons. The Court finds that the claims of the 14 named class representatives present common questions of law and fact. It is important to note in this regard that the cannery industry whose employment practices are subject to this suit has operated since the 1930's under an industry-wide collective bargaining agreement, which includes uniform seniority and job bidding procedures, industry-wide job classifications and pay rates, standard job descriptions for all plants, and a single, industry-wide grievance procedure. The claims of the named plaintiffs are that employment practices under the collective bargaining agreement and the industry-wide policies adopted by the defendant canneries and unions, and their industry-wide bargaining agents, operate in a discriminatory manner. The Agreement will modify, alter, and supplement the collective bargaining agreement.

An action such as this, where the plaintiffs bring an across-the-board attack on the allegedly unequal employment practices of the defendants, necessarily raises common questions of law and fact. *Johnson v. Georgia Highway Express, Inc.,* 417 F.2d 1122 (5th Cir. 1969); *see also, Rich v. Martin Marietta Corp.,* 522 F.2d 333, 340 (10th Cir. 1975); *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239 (3d Cir. 1975), *cert. denied* 44 L.Ed.2d 679 (1975).

The Intervenors challenged the propriety of certifying an industry-wide class in this action, questioning whether the claims of the named plaintiffs, all of whom are from the Modesto area and all of whom belong to one union local, are typical of the claims of

cannery workers in other areas who are employed by different companies and belong to different unions. However, the Court finds that the claims of the named plaintiffs are sufficiently typical of the claims of other class members, especially in light of the industry-wide employment practices under the collective bargaining agreement and the industry-wide solutions proposed in the Agreement. The fact that there is not a named plaintiff for each plant or facility location is not controlling in these circumstances.

Courts have unhesitatingly certified classes composed of members in widely separated geographical areas. *Johnson v. Georgia Highway Express, Inc., supra; Wetzel v. Liberty Mutual Insurance Co., supra; Piva v. Xerox Corp.,* 11 FEP Cases 1259 (N.D. Cal. 1975); *Sagers v. Yellow Freight Systems, Inc.,* 58 F.R.D. 54 (N.D. Ga. 1972). Moreover, courts have made clear that in the design of classes in employment discrimination suits, not every member of the class need be in an identical situation as the named plaintiffs. *Rich v. Martin Marietta Corp., supra.* Thus, it is not necessary that there be a named plaintiff adversely affected by each and every employment practice challenged in the complaint. *Dennison v. City of Water and Power,* 10 FEP Cases 1486 (C.D. Cal. 1975).

The Intervenors also assert that an industry-wide class is defective because the named plaintiffs lack standing to act as class representatives in an action against defendant companies with which they have never had any type of employment relationship or

against defendant union locals to which they never belonged.

In assessing this contention, it is important to remember that the typicality and commonality requirements of Rule 23 should be liberally applied in employment discrimination suits. *Piva v. Xerox Corp., supra.* The reason for this is that such suits enhance a broad public interest in enforcing fundamental constitutional principles as well as advancing the rights of the individual plaintiffs who bring the action. *Rich v. Martin Marietta Corp., supra,* 522 F.2d at 340. The Intervenors' reliance on *LaMar v. H. & B. Novelty and Loan Co.,* 489 F.2d 461 (9th Cir. 1973), *Kauffman v. Dreyfus Fund, Inc.,* 434 F.2d 727 (3d Cir. 1970), and *Chevaier v. Baird Savings Association,* 66 F.R.D. 105 (E.D. Pa. 1973), is clearly misplaced. Those cases are not Title VII cases and, thus, cannot be deemed to be dispositive in the instant case.

The clear import of those cases precludes class-action treatment where a plaintiff who has a cause of action against a single defendant attempts to represent a class of persons who may have been injured by the actions of other, *unrelated* defendants who have engaged in conduct closely similar to that of the single defendant. In such circumstances, it is reasonable to conclude that the named plaintiff cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action and at whose hands he suffers no injury. *LaMar v. H. & B. Novelty and Loan Co., supra,* 489 F.2d at 462.

However, all of the defendants in this case operate under a single, industry-wide collective bargaining agreement. As noted, the crux of this suit revolves around the operation of this agreement. Thus, this is not a case where the named plaintiffs are attempting to assert a cause of action against *unrelated* defendants. Accordingly, the Court finds that where a group of employees and unions operate pursuant to a uniform collective bargaining agreement through industry-wide representatives, it is appropriate that the plaintiff class be defined to include all affected employees who work under that agreement. *See, e.g., Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic.,* 384 F.Supp. 585 (S.D. N.Y. 1974), *aff'd* 514 F.2d 767 (2d Cir. 1975); *see also, Salinas v. Roadway Express, Inc.,* 10 FEP Cases 1173 (W.D. Tex. 1975); *Freeman v. Motor Convoy, Inc.,* 68 F.R.D. 196, 200 (N.D. Ga. 1975).

If the Intervenors' contention were correct, there could never be an industry-wide lawsuit and reformation of discriminatory industry-wide collective bargaining agreements since essential parties would always be absent unless there existed a plaintiff with sufficient time and money to find representatives at each plant and of each local union of each class of employee allegedly discriminated against. Alternatively, individual suits against each separate cannery and union local would be required. The insistence on such a requirement would be wasteful and contrary to the preference of the courts and of the EEOC for industry-wide remedies in Title VII actions. *See,*

United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975).

The Court further finds that the named plaintiffs meet the requirements of adequate representation of Rule 23 (a)(4). In making a determination as to the adequacy of representation, courts have looked to whether the interests of the class representatives are antagonistic to those of the class and whether counsel for the named plaintiffs possess the requisite ability and expertise to conduct the litigation. *Wetzel v. Liberty Mutual Insurance Co., supra,* 508 F.2d at 247.

The plaintiffs, along with all other class members, have an interest in alleviating the effects of the alleged employment discrimination in the canning industry. The named plaintiffs have been represented by experienced and competent counsel. The Court notes that the interests of the plaintiff class have been further protected by the participation of the EEOC in the negotiations. The EEOC, through its Regional Director, has indicated its approval of the settlement.

In regard to adequacy of representation, the Court has also considered the fact that the parties to this settlement have provided for an "opt-out" procedure for potential class members who do not wish to be bound by the terms of the settlement. This provision provides "minority and female employees the opportunity to make an informed and voluntary choice over whether [the settlement] is satisfactory to them". *United States v. Allegheny-Ludlum Industries, Inc., supra,* 517 F.2d at 864. This "opt-out" procedure

strengthens the overall reasonableness of the settlement and further insures the adequacy of representation of the class interests by the named plaintiffs.

Furthermore, with regard to the requirements under Rule 23(b)(2), the Court finds that the defendants in this case, through the operation of the industry-wide collective bargaining agreement, have acted on grounds generally applicable to class members and thereby industry-wide injunctive relief affecting all class members is appropriate. Accordingly, I hereby certify this action as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure. *Cf. Wetzel v. Liberty Mutual Insurance Co., supra.*

I should also add that this action could also properly be certified under the requirements of Rule 23(b)(3) in that common questions of law and fact predominate over any individual questions and, for the reasons previously stated, an industry-wide class is superior to any other available method of litigating this case. Alternatively, I also certify this action as a class action under Rule 23(b)(3).

The Intervenors assert that the parties have violated the clear mandate of Section 1.46 of the Manual in negotiating a settlement prior to class certification. The Manual does warn that "care should be taken to avoid undesirable, premature, unauthorized settlement negotiations in class actions. Before any settlement negotiations, there should be a class action determination." The Manual also advises against the formation of tentative classes for the purposes of settlement, concluding that tentative classes for the pur-

poses of settlement, with or without the provision that the members should be required or permitted to opt out and litigate their claims for relief, should never be formed.

The Manual relies on the reasons set forth in *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971), in making these recommendations. There the court expressed concern that a person who negotiates as an unofficial class representative must be under strong pressure to conform to the defendants' wishes out of the fear that the defendant will negotiate with someone else if the unofficial representative proves recalcitrant. Other reasons cited in the Manual for disapproval of tentative settlement classes include (1) doubt about their propriety under Rule 23, (2) fears concerning inadequate representation, (3) lack of adequate information concerning the size of the class and the amount of potential damages, and (4) preemption of a party's choice to litigate individually or as a class member.

However, not all courts have followed the Manual's recommendations. Indeed, even in *Ace Heating,* the court refused to overturn the trial court's use of the tentative settlement class procedure, although the reviewing court did caution that a trial judge should be "doubly careful" in evaluating the fairness of such settlements. *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d at 33.

In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 466 (2d Cir. 1974), the tentative settlement class procedure was also approved. The court called attention

to the fact that the Manual contains recommendations, not intractable rules which should be followed blindly.

A commentator recently also opined that tentative settlement classes are appropriate in Title VII cases. Note, *The Tentative Settlement Class and Class Actions Under Title VII of the Civil Rights Act,* 72 Mich. L. Rev. 1462 (1974).

Moreover, the dangers of a tentative settlement class which underlie the Manual's disapproval are not present in the instant case. Here, the plaintiffs lost no "leverage" because they were not the certified representatives of an industry-wide class because the defendants were the ones who insisted on an industry-wide settlement. The participation of the EEOC in the negotiations provided additional protection against a "sellout". Furthermore, the question of adequacy of representation was well litigated and subject to close judicial scrutiny.

Accordingly, the Court finds that the use of the tentative settlement class procedure was appropriate in this case.

IV. THE AGREEMENT

We turn now to an evaluation of the Agreement.

A. The Scope of Review in Assessing the Agreement

The proposed settlement should be assessed in light of the principles discussed in the recent Fifth Circuit opinion in *United States v. Allegheny-Ludlum Industries, Inc., supra.* In this thoughtful and thorough

opinion, Judge Thornberry outlined the rules of law which govern the review of a settlement, particularly in a Title VII case. The decision emphatically affirms the principle that "conciliation and voluntary settlement are the preferred means for resolving employment discrimination disputes". 517 F.2d at 846. Stated another way, "voluntary compliance is preferable to court action and * * * efforts should be made to resolve these employment rights by conciliation both before and after court action". 517 F.2d at 846.

These principles were affirmed mindful of the Supreme Court's recent pronouncements to the effect that Congress gave private individuals a significant role on the enforcement process of Title VII and that the final responsibility for enforcement of Title VII is vested with the federal courts. 517 F.2d at 848.

As for the general principle governing the approval of settlements, the task was aptly summarized by Judge Wyatt in *West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710, 740-41 (S.D. N.Y. 1970), *aff'd* 440 F.2d 1079 (2d Cir. 1971), *cert. denied* 404 U.S. 871 (1971):

> "Whether to approve a compromise involves an exercise of discretion. The Court is responsible for the protection of the many class members whose interests are involved but who do not appear in the action. Approval should be given if the settlement is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically."

The most important factor to be considered is the strength of the plaintiff's case. Another important element in the equation is the estimated length, complexity, and expense of the litigation. However, the court should not endeavor to make a final determination of liability or damages. Nor should a court attempt to determine whether the proposed settlement is the best possible or even whether a better agreement might have been negotiated. As Judge Thornberry stated:

> "The central issue here is not whether the consent decrees achieve some hypothetical standard constructed by imagining every benefit that might someday be obtained in contested litigation." *United States v. Allegheny-Ludlum Industries, Inc., supra,* 517 F.2d at 850.

Additional factors to be considered are the extent of discovery which was conducted and the opinion of counsel that the settlement should be approved. *Flinn v. FMC Corp.*, 10 EPD ¶10,408 (4th Cir. 1975). The approval of the EEOC is another important guide to the Court in its consideration. *Flinn v. FMC Corp., supra.*

B. Structure of the Canning Industry

In order to understand the terms of the proposed settlement now before the Court for approval, and in order to gauge the propriety of maintaining this action as a class action, it is necessary to outline briefly the nature of the canning industry.

As noted, CPI and the State Council have been parties to an industry-wide collective bargaining agreement for many years. The most recent agreement covered some 57,000 workers in 74 separate facilities throughout Northern California. The canning industry operates on a seasonable basis. During the peak harvest season for fruits and vegetables processed by the defendants, June-October, as many as 60,000 people are employed.

Virtually all bargaining unit jobs are functioning during the peak of the processing season. After the season, however, many bargaining unit jobs do not operate, as they are directly associated with the processing of fruits and vegetables. Some jobs do continue for a time after the season, and a lesser number continue virtually all year-round. Thus, during the down-season, employment drops to some 4,000 to 15,000 persons per month. Females are estimated to constitute some 58% of the present peak-season work force; the percentage of minority workers in the peak-season work force is estimated at 62%.

Cannery jobs are rated and paid commensurate with the skills required. Each job is designed by bracket number, with IA being the highest and V the lowest. Jobs in brackets III and above are referred to as "high-bracket" jobs. Approximately 11,000 jobs in the industry are high-bracket jobs. Advancement to higher brackets is based on a posting and seniority system. Job openings are posted and individuals bid for them. The individual with the

highest seniority and the qualifications to perform the job is awarded the job.

An employee's ability to secure a job which continues after the processing season, many of which are high-bracket jobs, depends in part on the employee's seniority relative to others who seek the job. The more senior employees have an opportunity to "bump" less senior persons out of such job opportunities. Workers who successfully withstand layoffs and thereby work more than 1,400 hours a year are called "regulars"; those persons employed for less than 1,400 hours a year are called "seasonals". Regular workers have better fringe benefits than seasonals. They also enjoy a guaranteed pay rate, unlike seasonal workers.

Until 1973, the collective bargaining agreement created two seniority lists. One list contained the names of all regular employees, that is, those who had worked for 1,400 hours during a one-year period. Most of those listed on the regular list were males. Employees who worked more than 30 days but less than 1,400 hours during the year were placed on the "seasonal" seniority list. Virtually all persons on the seasonal list were females. Under the provisions of the collective bargaining unit which existed prior to 1973, 1,400-hour employees had greater seniority than non-1,400-hour employees. In 1973, the collective bargaining agreement was modified so that the seniority lists were merged, with the 1,400-hour employees placed above the non-1,400-hour employees on the single

seniority list. New employees, regardless of their status, were placed at the bottom of the combined list in order of hire.

Thus, in regard to relative seniority, seasonal employees were clearly disadvantaged when compared with regular employees. A related seniority disadvantage suffered by seasonal workers existed in regard to those employees who sought high-bracket jobs (Bracket III and above) during the processing season. Employees on the 1,400-hour list would have had more seniority on which to base a bid into a job in a high bracket during the processing season.

The central allegation of discrimination in this action is that females and minority group members have been denied opportunities to obtain high-bracket and regular (year-round) positions within the industry. The main thrust of plaintiffs' attack is directed at the dual seniority system, created and enforced by the collective bargaining agreement, and institutionalized in 1973 through the "grandfathering" of the regular employee seniority list over the seasonal list. Plaintiffs charge that the functioning and administration of the seniority system is the basic cause of the alleged disparate treatment between Anglo males, on the one hand, and females and minority group employees on the other hand.

C. Terms of the Agreement

The essential elements of the Agreement include the following:

1. *Affirmative Action Obligations*

The Agreement creates a one-for-one job placement formula for women and minorities in both high-bracket job vacancies and mechanic vacancies until the goals prescribed in the Agreement are met and maintained for each high bracket. The goals for high-bracket jobs are: for women, 30% of the jobs in each high bracket; for minorities, the percentage of the jobs in each high bracket must equal that minority group's percentage of the population in the county where the plant is located. The goals for mechanics are the same as high-bracket job goals for minorities; for women, the goal is 20% of the mechanic jobs in each high bracket.

Under the Agreement, women and minorities will not be prevented from bidding for the nonpreference slots. They will bid based on plant seniority as described below.

In order to facilitate women and minority advancement in high-bracket jobs, the defendants will give off-season training to minorities and women based on the number of anticipated vacanices in the high-bracket positions. The training for each employee will be of three-weeks duration and may involve up to three jobs. Employees who complete this training will be considered qualified for the job. During training, employees shall receive their regular rate of pay.

A training program for prospective mechanics of approximately one year in duration is also created under the Agreement.

The parties estimate that 1,800 to 2,200 vacancies in high-bracket and mechanic jobs will occur each year throughout the industry. In order to encourage women and minority-group employees to bid on and retain high-bracket jobs until the goals are met and maintained, women and minority-group employees attaining high-bracket jobs and working 500 hours will receive promotion incentives of $150. After working another 500 hours in a high-bracket job, they will receive an additional $150.

Moreover, the Agreement provides for the elimination of the "incumbency rule", a tacit understanding under which the holder of a job in the previous season supposedly got preference for that position upon recall at the beginning of the peak season, regardless of seniority. Such a rule would have had the effect of acting as a barrier to upward mobility of women and minorities into high-bracket positions.

2. *Revising the Seniority Lists—Plant Seniority*

The ability of a worker to move into high-bracket and regular jobs depends in large part upon seniority. Up to now, seasonal workers had relatively low seniority because, when the seniority lists were merged, all the seasonal workers were placed below the regular workers in terms of seniority. This put the seasonal workers, most of whom were women, at a serious disadvantage in bidding for high-bracket jobs.

The Agreement addresses this problem by introducing the concept of plant seniority. Under the Agreement, whenever a woman or minority attains a high-

bracket or mechanic job, that person moves up on the seniority list for layoff and recall purposes, and fringe-benefit calculations, based on his or her earliest seniority date, that is, the earlier of the date of that person's hiring on either the 1,400-hour seniority list or the non-1,400-hour seniority list. In addition, all women and minorities who have attained a high-bracket or mechanic job since July 2, 1965, move up on the seniority list in the same manner. Moreover, under the Agreement women and minorities will be entitled to use plant seniority in bidding to attain the high-bracket or mechanic jobs.

The Agreement makes it clear that all jobs are open for claiming at the beginning of the canning season and that class members may use plant seniority in bidding to attain these jobs. Prior to the beginning of each season, all positions, including regular and mechanic positions, will be "racked up" and posted. Positions to which persons having worked the previous season intend to return are subject to claim by class members on the basis of plant seniority and qualifications. Position on the "rack up" that are open because the previous season's holder has not returned are considered "vacant". Class members may bid on such vacancies on the basis of plant seniority and qualifications and, as to such openings, the Agreement guarantees that one of every two vacanices are to be filled by a class member. Vacancies occurring during the season are also subject to the one-for-one rule. Work force adjustments occurring during the season are governed by contractual seniority. However, the

ability of class members to withstand layoffs is enhanced by the attachment of plant seniority for layoff and other purposes upon attainment of a high-bracket or mechanic position.

The introduction of plant seniority, together with the promotional preference described above, will substantially increase the opportunity for women and minorities to bid on and attain jobs of their choice in the canneries. Statistical projections introduced at the hearing indicate that women are expected to occupy 50% of the high-bracket jobs and 25% of the mechanic positions in the industry after five years. Minorities are projected to hold approximately 61% of the high-bracket jobs. Thus, it is projected that at the end of the five-year term of the Agreement, over 80% of the high-bracket jobs in the canning industry will be held by class members.

These provisions of the Agreement are designed to place class members in the employment status which they would have occupied but for the alleged discrimination of the defendants, and thus gain for such class members their "rightful place" within the cannery work force. *Cf. Franks v. Bowman Transportation Co.*, 44 U.S.L.W. 4356 (U.S. Mar. 24, 1976); *United States v. Navajo Freight Lines, Inc.*, 525 F.2d 1318 (9th Cir. 1975); *Gamble v. Birmingham Southern R.R. Co.*, 514 F.2d 678 (5th Cir. 1975).

3. *Compensating Victims of Past Discrimination*

An Affirmative Action Fund (the Fund) will be established, funded by contributions by the defendant

companies based on three cents per hour worked by each bargaining unit employee. About $5 million will be paid into the Fund over the five-year life of the Agreement.

The Fund will be managed by four trustees, two appointed by the canneries and two appointed by the unions. A two-member Conformance Committee is also created, composed of one representative of the EEOC and one representative of the Mexican-American Legal Defense and Educational Fund (MALDEF), counsel for the plaintiffs. Each decision of the Board of Trustees concerning disbursements from the Fund is subject to Conformance Committee approval.

The first call on the Fund in an amount up to $4.9 million is to compensate employees for past discrimination. All class members have the right to file discrimination charges for back pay and other relief. The defendants will distribute EEOC discrimination charge forms to class members. These charges will be conciliated by the EEOC. If not disposed of in this fashion, the matters will go before a special master appointed by the Court. The Fund will compensate individuals for such back-pay claims as are determined appropriate by the master.

Any awards that result from future invidious conduct of the defendant companies are *not* compensable from the Fund. They will be paid by the individual company or union involved.

The Fund will also pay for the incentive payments provided to women and minority workers who retain

high-bracket jobs for more than 500 hours up to a limit of $1 million. It will also fund the training programs created under the settlement.

4. *Enforcement, Monitoring, and Reporting*

To implement the Agreement and oversee the entire industry-wide affirmative action effort, an Office of Affirmative Action is created by the Agreement.

The Agreement also established expedited dispute resolution procedures for all charges and complaints concerning the subject matter of the Agreement. A recent modification of the Agreement provides that a class member will serve as a liaison person in each plant to facilitate the investigation of any disputes.

Additionally, the Agreement calls for reporting by both the canneries and the unions as to matters concerning the achievement of the goals and objectives of the Agreement. It further provides for the monitoring of the defendants' compliance by the EEOC and MALDEF. Moreover, the Court retains jurisdiction of the action for the purpose of enforcing the terms of the Agreement.

5. *Obligations of the Unions*

Finally, the Agreement imposes upon the defendant unions and the State Council the obligation to hire and maintain minority and female employees in union staff positions in the same proportion as their representation in the work force. It also obligates the unions to furnish translations of certain documents, including the collective bargaining agreement to its members.

D. Objections to the Agreement

Intervenors have raised objections to specific terms of the Agreement and have challenged its overall adequacy. Their objections are largely ones of degree, for the Agreement addresses each of the specific problems they raise.[3] Of course, the Agreement should be

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[3] A number of objections originally raised by the Intervenors have been mooted by modifications in the Agreement incorporated during the course of the proceedings. Among the modifications and clarifications to the Agreement pertinent in this regard are the following:

(1) A clarification of the definition of "plant seniority" to make it clear that every class member may use plant seniority in *bidding* for all high-bracket jobs during the term of the Agreement. Without this clarification, the Agreement appeared to provide for the attachment of plant seniority only *after* a class member had attained a high-bracket job.

(2) A revision calling for the elimination of the "incumbency rule" in all high brackets. As originally proposed, the Agreement only specifically provided for the abolition of the "incumbency rule" in Bracket IV jobs, the second lowest of the eight contract pay brackets.

(3) The inclusion of a specific provision requiring the defendant employers to post notices of all high-bracket jobs which become available at the beginning of each processing season, and to accept applications for these jobs from class members.

(4) A clarification indicating that as much as $4.9 million of the Fund would be available for payment of back-pay claims, and a commitment from the defendant employers that they intended to fulfill the affirmative action and training obligations under the Agreement even if more than $5 million were required to carry them out.

(5) A clarification insuring that the promotion goals established in the Agreement applied to *each* high bracket.

(6) The expansion of the class of persons eligible to obtain the benefits of plant seniority to include those class members who have attained high-bracket jobs from July 2, 1965, as well as those who attain a high-bracket job during the life of the Agreement.

(7) The expansion of the duties of the Conformance Committee to include the explicit right to contest the discharge of the Director of Affirmative Action.

(8) The inclusion of a provision calling for the appointment of a class member representative in every cannery by

approved if it is fair, reasonable, and adequate, if it presents a reasonable compromise taking into account the many factors and variables which enter into a case such as this. Even vigorous opposition to the settlement, or objection by a large number of class members does not render a settlement unreasonable. *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 863 (3d Cir. 1974), *cert. denied*, 419 U.S. 900 (1974). Here, objections amounted to a small fraction of one percent of the class.

The Intervenors first question whether the provisions of the Agreement introducing the plant seniority concept are sufficient to afford class members their "rightful place" in the cannery work force.[4] Inter-

the Director of Affirmative Action to act as a liaison in the dispute resolution process and to investigate and make recommendations regarding disputes.

(9) The undertaking by the defendant unions to provide their members with translations of pertinent documents, including the collective bargaining agreement.

[4]The Intervenors and the Proponents essentially agree on the legal standard currently adopted by courts in assessing affirmative action programs which attempt to remedy the effects of past discrimination in seniority and promotion. The test, first formulated by the Fifth Circuit, is called the "rightful place" theory. In *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), the court invalidated a seniority system which gave priority to workers who had worked the longest in the job slot below the vacancy where present seniority had been carried over from a time when progression lines had been segregated. The Court held that this system violated Title VII since it tended to perpetuate the effects of past discrimination.
The court endorsed a "rightful-place" system whereby progression continued to be on a job-by-job basis, but seniority was determined by time at the mill rather than time in the job slot below the vacancy. In construing Title VII, the court stated:

> "The Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system that 'locks in' prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings." 416 F.2d at 988.

The "rightful place" test has been reaffirmed in more recent decisions regarding the revamping of seniority and progression lines. *See, e.g., United States v. Navajo Freight Lines, Inc.*, 525 F.2d 1318 (9th Cir. 1975); *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Gamble v. Birmingham Southern R.R. Co.*, 514 F.2d 678 (5th Cir. 1975).
The Supreme Court recently expressed its view that the adjustment of seniority rights in accord with the "rightful place" theory is consistent with the "make-whole" remedies intended by Congress to effectuate Title VII. *Franks v. Bowman Transportation Co.*, 44 U.S.L.W. 4356 (U.S. Mar. 24, 1976).

venors point out that under the Agreement plant seniority may be used for bidding on high-bracket jobs, but cannot be asserted for layoff, recall, or shift assignment until and unless the class member first obtains a high-bracket job. The Intervenors assert that the Agreement should provide for the immediate utilization of plant seniority by class members for all purposes.

However, the Intervenors' proposal for across-the-board plant seniority ignores the seasonal nature of the industry and the fact that under the collective bargaining agreement, an employee who refuses to do available work for which he or she has the seniority and qualifications suffers a complete loss of seniority. Thus, if plant seniority were immediately granted to class members for all purposes, large numbers of seasonal workers would be placed in line for regular jobs continuing after the season and would be required to accept such employment or lose seniority rights.

Evidence introduced at the hearing suggests that many seasonal employees do not desire year-round

employment. The plant seniority concept developed by the Proponents of the Agreement was fashioned with this fact in mind. Therefore, class members desiring to work year-round may use plant seniority for bidding purposes, while those who wish to experience a layoff at the end of the peak season are not penalized for failing to accept available work. Such an accommodation reflects the realities of the canning industry while still fostering the employment goals of Title VII.

Moreover, in assessing the Intervenors charge in this regard, Judge Thornberry's opinion in *United States v. Allegheny-Ludlum Industries, Inc., supra,* is again pertinent:

> "Next, to the extent that the settlement may in occasional respects arguably fall short of immediately achieving for each affected discriminatee his or her 'right place,' we must balance the affirmative action objectives of Title VII and Executive Order 11246 against the equally strong congressional policy favoring voluntary compliance. The appropriateness of such balancing is especially clear, as here, 'in an area where voluntary compliance by the parties over an extended period will contribute significantly toward ultimate achievement of statutory goals.'" 517 F.2d at 850.

The Intervenors also question the propriety of granting plant seniority only to class members and not to all members of the work force. The Intervenors suggest that class members will thereby gain an unfair advantage (seniority based on first date

as seasonal) over regular, nonclass member employees, whose seniority will remain fixed at the date they first moved into the regular seniority list. They argue that such a proposal would grant class members more than their "rightful place" in contravention of the recent Ninth Circuit decision in *United States v. Navajo Freight Lines, Inc., supra.*

However, Intervenors' reliance upon *Navajo Freight* is plainly misplaced. There, the employer maintained separate seniority lists for local drivers and over-the-road drivers. Minorities in local driving positions who wished to transfer to over-the-road positions had to forfeit their total accumulated local seniority and start as new employees in the over-the-road classification. To remedy the discrimination found in that case, the court's decree provided that local drivers could carry their company local seniority when they transferred to over-the-road positions. As noted by the Ninth Circuit:

> "This Order [the District Court's order] did not displace any non-minority road driver from his existing position. It merely established an orderly method by which members of the discriminatee class could apply and qualify for road driver positions 'when vacancies occur.'" 525 F.2d at 1318.

The Agreement here does precisely the same as the district court order in the *Navajo Freight* case. Females and minority group employees who bid on high-bracket jobs will carry with them their full accumulated seniority and use that seniority to bid on other jobs which will enable them to work year-round.

In *Navajo Freight,* the court went on to say that only those measures which require discharge of incumbents or are contrary to the dictates of "business necessity" are forbidden in the fashioning of remedies to afford discriminatees their "rightful place". 525 F.2d at 1326.

Nothing in the Agreement allows class members to "bump" nonclass incumbents from preferred positions. Such a measure might well run afoul of Title VII. *Patterson v. American Tobacco Co.,* 12 FEP Cases 316 (4th Cir. 1976). Even though the Agreement provides that all positions are open for claiming at the beginning of the season, and that class members may utilize plant seniority in bidding for these positions, such openings are not secured jobs from which nonclass incumbents are wrenched by the readjustment of seniority.

Any suggestion that Title VII forbids the award of retroactive seniority to class members which will conflict with the seniority expectations of nonclass members was recently put to rest by the Supreme Court in *Franks v. Bowman Transportation Co., supra.* There, the Court stated:

> "* * * it is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central 'make-whole' objective of Title VII. These conflicting interests of other employees will of course always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But, as we have said, there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination * * *. Accordingly, we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. 'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.'" 44 U.S.L.W. at 4364.

The Intervenors also argue that the Agreement does not adequately advance the interests of women in attaining high-bracket, mechanic, and year-round positions. The effects of the promotional goals set for women in high-bracket and mechanic jobs during the five-year effective period of the Agreement have been set forth in statistical projections introduced at the hearing and supported by evidence. The projections show that the total effect of the promotional goals, the one-for-one promotional preference for women, and the reconstruction of the seniority lists through implementation of the plant seniority system plus other provisions of the Agreement will result in women holding approximately twice the number of high-bracket and mechanic jobs presently held by women, if they are interested in doing so. Thus, it is estimated that women will occupy at least 50% of

the high-bracket jobs and 25% of the mechanic positions at the end of the term of the Agreement. These figures demonstrate that significant steps will be taken under the Agreement to improve the level of participation of women in the high-bracket and mechanic jobs.

The Intervenors argued that the movement of women into high-bracket jobs will result in a reduction in the number of minority men holding those jobs at the end of the five-year term of the Agreement. However, this prediction regarding the loss of jobs by minority males was based upon questionable hypotheses. It also fails to take into account that minority males will have the benefit of using their plant seniority claim and retain high-bracket jobs. Even if there were to be a reduction in the number of minority males in those jobs, and there is considerable expert opinion that that will not in fact occur, it is clear that the effect on minority men will be small compared to the effect on Anglo men. In any event, minorities will still hold a high proportion of these jobs compared to either their percentage in the county population or the plant work force.

Intervenors claim that the utilization of parity with county labor force statistics as the goal for minority participation in high bracket and mechanic jobs is improper. They suggest that a standard of plant or work-force parity, that is, parity with the percentage of minorities working in each plant, be adopted. In fact, because each high bracket must be at parity before the goal is met, the results of the promotional preference contained in the Agreement will approximate work-force parity. The goals set by the Agreement which, it must be remembered, is the product of a settlement, are reasonable ones consistent with the objectives of Title VII. Relevant prior decisions and available governmental guidelines have approved the use of Standard Metropolitan Statistical Area (SMSA) or county population figures as the appropriate affirmative action goals. *See, e.g., Legal Aid Society of Alameda County v. Brennan*, 8 EPD ¶9483 (N.D. Cal. 1974); Executive Order No. 4 (41 C.F.R. §60-2); OFCC Technical Guidance Memo No. 1. *See also, Reed v. Lucas*, 11 FEP Cases 153 (E.D. Mich. 1975); *Boston Chapter NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1026-1027 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). Although work-force parity might well be appropriate if the case proceeded to a litigated outcome, the Court finds no reason for insisting upon such a goal in this settlement. Nor does the Court find that the utilization of county-parity goals rather than work-force parity renders the Agreement unjust, unreasonable, or inadequate.

The Intervenors also challenge the adequacy of the Fund available to compensate victims of defendants' past discrimination and the procedures which must be followed by class members to assert a back-pay claim. As noted earlier, the first call on the Fund, up to an amount of $4.9 million, is to provide monetary relief to those asserting back-pay claims. To be eligible to recover back pay, a class member is

required to file a discrimination charge form with the EEOC. In view of this requirement, the defendants have agreed to mail a blank form to every possible class member and have stipulated that a class member may submit the charge form, as a claim for back pay within 180 days of the effective date of the Agreement.

The attorneys for the plaintiff class and the EEOC have estimated the number of meritorious discrimination charges which will be made by the class and the ultimate dollar value of those charges, taking into account, among other factors, the questions of proof and method of computation of the amount of back pay to which the employee is entitled.

There was considerable dispute as to amounts of back pay to which an average class member would be entitled, with estimates ranging from several hundreds to many thousand of dollars. However, in light of the size of the available fund and the small number of discrimination charges which have hitherto been filed by class members, the Court is satisfied that the Fund provides a reasonable pool from which to draw back-pay claims. Moreover, the Court finds that the procedures established under the Agreement to assert back-pay claims are not unnecessarily burdensome. The Court also rejects the Intervenors' contention that the Agreement is defective because only the employers and not the unions contribute to the Fund. The Court is not persuaded that the absence of union contributions to the Fund here renders the Agreement unfair or in any way affects the interests of the class.

The Intervenors also disagree with the training aspects of the settlement. They argue that no jobs other than mechanic jobs require anything more than minimal on-the-job training, but there is no credible evidence in support of their claims. The Proponents have not argued that extensive off-season training is needed for *all* high-bracket jobs, but only for certain jobs which can lead to regular status. There is ample evidence showing the need for off-season training in these particular high-bracket jobs. With regard to mechanic training, the evidence is clear that the hectic pace in the plant during the processing season prevents effective on-the-job training at least for the initial stages of such training. Moreover, the off-season paid training under the settlement constitutes a substantial monetary benefit to class members, since class members will be paid during the time they are receiving training.

In addition, the Intervenors claim that the grievance arbitration procedures have been administered in a discriminatory fashion by the local unions and the State Council and that the Agreement did nothing to remedy the situation. No such discrimination was found.

Furthermore, that part of the settlement which calls for class members to be appointed business agents and shop stewards proportional to their membership in the union is a highly innovative device which will insure that class members at the plant will take their complaints to the grievance procedure.

A challenge has also been raised to the monitoring and enforcement procdeures of the Agreement. There was substantial evidence, however, showing that the enforcement procedures in the settlement are unique and extremely beneficial to class members. In addition to the expedited EEOC procedures, class members have the option of an informal dispute resolution procedure conducted by the Director of Affirmative Action and the Director's liaison in the plant and a summary court procedure. Even the expert witness of the Intervenors testified that these procedures were far better than those ordinarily available to charging parties. He also stated that he did not know of any other lawsuit litigated or settled which had such far reaching enforcement mechanisms. Added to the individual's enforcement rights are the right of the EEOC and MALDEF to sit on the Conformance Committee and to acquire knowledge of the employment practices of the plants through the reporting provisions. The Court finds that these monitoring and enforcement procedures are adequate to ensure the prompt and effective implementation of the Agreement, and to provide for prompt review of charged violations during the the term of the Agreement.

Finally, the Intervenors claim that the establishment of the Fund violates provisions of federal labor laws prohibiting certain employer contributions to unions. They contend that the Fund, fully funded by the defendant companies and administered by a Board of Trustees composed of two trustees selected by the employers and two by the unions, violates Sections

302(a) and (b) of the Labor Management Relations Act of 1947. 29 U.S.C. §186(a) and (b). These sections prohibit an employer from paying, lending, or delivering money to a labor organization except in certain defined circumstances. 29 U.S.C. §186. They assert that these provisions will be violated because the Fund will be used to pay back-pay claims resulting in part from the discriminatory practices of the defendant unions, and they argue that this, in effect, results in the assumption by the employer of potential liabilities of the unions in violation of the Act.

The Court disagrees. At the outset, it should be noted that the Congressional intent behind the enactment of Section 302 was to prevent bribery by employers and extortion by union representatives, and to prevent any possible abuse of power by union officials if trust funds were left to their sole control. *Arroyo v. United States,* 359 U.S. 419, 424-427 (1959).

The Fund, to be administered by a Board of Trustees composed of company and union representatives whose actions are challengeable by an independent Conformance Committee, is certainly not within the sole control of the unions. Nor can the establishment of the Fund be construed to be the type of "bribe" or payment forbidden by Section 302. The Act was designed to prevent specific problems peculiar to the collective bargaining process; it was not intended to block any cooperative effort between union and management relating to remedying the effects of alleged discrimination in employment practices.

Moreover, the Fund falls squarely within the exception to Section 302 permitting employers to contribute to trust funds "established * * * for the purpose * * * of defraying the costs of apprenticeship and other training programs * * *". 29 U.S.C. §186(c)(6). *In re Trustees of Operating Engineers, Etc.,* 303 F.Supp. 1126 (N.D. Cal. 1969), is controlling in this regard. In that case, the court held that the establishment of an affirmative action and apprenticeship training fund similar in purpose to the Fund herein did not violate Section 302 although it was financed by employer contributions since the fund fell within the above-described exception.

The Intervenors' contention that the establishment of the Fund violates Section 8(a)(2) of the Labor Management Relations Act of 1947 (29 U.S.C. §158(a)(2)) is also without merit. This section makes it an unfair labor practice for an employer to contribute financial support to a labor organization. It has been construed to proscribe attempts by an employer to dominate, interfere with, or promote a union. *See, e.g., NLRB v. Thompson Ramo Wooldridge, Inc.,* 305 F.2d 807 (7th Cir. 1962); *NLRB v. Wagner Iron Works,* 220 F.2d 126 (7th Cir. 1955). However, where, as here, the independence of a labor organization is not threatened by the actions of the employer, Section 8(a)(2) is not violated. This section does not prohibit all cooperation between a company and a union; it only prohibits attempts to dominate the union. *See, Chicago Rawhide Manufacturing Co. v. NLRB,* 221 F.2d 165 (7th Cir. 1955). The establishment and operation of the Fund will in no way infringe upon the union independence vis-a-vis their collective bargaining relationship with the cannery employers.

E. Conclusion

In evaluating the Agreement, this Court must take into account the likely rewards of litigation. *Cf. Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424-425 (1968). Evidence adduced at the hearing indicates that the plaintiffs would have had difficulty at a trial on the merits establishing a *prima facie* case of discrimination at least in regard to the claims of minority males. Difficulties of proof would also have arisen with regard to individual claims of back-pay liability. Thus, it can be fairly said that plaintiffs' case was not entirely free from doubt, and a prediction of the ultimate litigated outcome would be speculative at best.

There are, obviously, many other possible means to redress alleged employment discrimination which could have been discussed, negotiated, and possibly included in the Agreement. A suit of this type addresses a complex of plant procedures, hiring, promotion, layoff, and recall rules and regulations. The industry involved in this case undoubtedly has a more volatile and fluctuating employment pattern than most. What this Court must decide is whether the provisions of this settlement amount to a fair, reasonable, and adequate voluntary resolution of the issues raised by the plaintiffs.

Having reviewed the evidence, heard the opinions of the expert witnesses, and studied the Agreement as modified and amended, I now find and determine that the Agreement is a fair, reasonable, and adequate resolution of this case.

The central allegation of discrimination in this action is that females and minority group members have been denied opportunities to obtain high-bracket and year-round positions within the canning industry. I am convinced that the Agreement provides a fair and reasonable solution to this claimed discrimination by restructuring the seniority, bidding, and training provisions under the collective bargaining agreement. The Agreement also establishes hiring preferences and goals to insure that the basic objective of opening up high-bracket and year-round positions for females and minorities is achieved. The Agreement further provides monetary relief to compensate the victims of past discrimination as well as to pay for future affirmative action obligations. I am also satisfied that the enforcement, reporting, and monitoring provisions of the Agreement are adequate.

I have thoroughly examined the objections to the Agreement raised by the Intervenors and others. However, I am not presuaded that any of the asserted defects, either singularly or taken as a whole, destroy the fairness, reasonableness, and adequacy of the settlement. I believe that the Agreement represents a great step forward for female and minority workers in the canning industry, and I feel that the plaintiff class should be afforded the immediate benefits of the

Agreement rather than await the uncertain results of a litigated outcome several years from now. While other, and perhaps better, results might have been obtained after years of litigation, I am satisfied that the Agreement is one which effectuates and implements the remedial purposes of Title VII. Accordingly, the Court hereby approves the Agreement as amended and modified by the parties. The Court retains jurisdiction of this action for the purpose of monitoring the implementation of the terms of the Agreement.

V. DENIAL OF MOTIONS FOR INTERVENTION

There remains the pending motions to intervene in the instant suit filed on April 28 and June 13, 1975.

The Intervenors claim entitlement to intervene in this suit as a matter of right under the provisions of Rule 24(a)(2) of the Federal Rules of Civil Procedure. This section authorizes intervention as a right when (1) the applicant claims an interest in the property or transaction which is the subject of the action, and (2) he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless (3) the applicant's interest is adequately represented by existing parties.

Earlier, I granted the Intervenors Limited rights of intervention for the purpose of fully participating in the hearing on the approval of the Agreement. This included discovery rights to enable them to gather

information relevant to the proposed Agreement and to fully present their arguments in opposition to the settlement. *See, United States v. Allegheny-Ludlum Industries, Inc., supra,* 517 F.2d at 879; 3B J. Moore, *Federal Practice,* ¶23-1441 and ¶23.90[2] at 23-1621-23-1623 (2d ed. 1975).

I now find that the Intervenors have *not* met the requirements for full intervention as a matter of right under Rule 24 of the Federal Rules of Civil Procedure. Although the Intervenors, as potential members of the class, undoubtedly may claim an interest in the subject matter of the action, I find that they are *not* so situated that the disposition of this action may, as a practical matter, impair or impede their ability to protect their interests.

I note that the Agreement allows any class member who does not wish to be bound by the terms of the Agreement to exclude themselves by opting out. Such persons, including the Intervenors if they so desire, are not bound by the Agreement and may pursue their own remedies in this or any other appropriate forum. Especially in light of the ample opportunity that the Intervenors have had to express their opposition to the settlement, and to influence the fashioning of the Agreement, I am satisfied that the ability to opt out precludes the Intervenors from satisfying the impairment-of-interest test. *United States v. Allegheny-Ludlum Industries, Inc., supra,* 517 F.2d at 845.

The opportunity to participate in the fashioning of the final Agreement afforded the Intervenors through

these proceedings distinguishes *Johnson v. San Francisco Unified School District,* 500 F.2d 349 (9th Cir. 1974).

Accordingly, the motions to intervene filed on April 28 and June 13, 1975 are hereby DENIED.

Dated: May 4, 1976.

/s/ William H. Orrick
William H. Orrick
United States District Judge

Appendix D

United States District Court
Northern District of California

No. C-73-2153 WHO

Maria Alaniz, et al.,
Plaintiffs,
vs.
California Processors, Inc., Walnut Creek, CA, et al.,
Defendants.

[Filed July 22, 1976]

OPINION

On April 1, 1976, this Court approved a settlement in this class action employment discrimination suit brought on behalf of a class of female and minority cannery workers. The complaint in this action alleged that the defendants, the employers, and unions of some seventy-four food processing and canning facilities in Northern California and their industry-wide collective bargaining agents unlawfully denied female and minority group members opportunities to obtain higher-paying and year-round positions within the canning industry.

The settlement set forth a comprehensive, industry-wide, five-year plan to remedy the effects of past discrimination against the affected class and to prevent future discrimination in the canning industry in Northern California. The settlement calls for the restructuring of seniority, job bidding, and job training provisions of the collective bargaining agreement governing employment conditions in the industry. It establishes hiring preferences and goals to insure that the basic objective of opening up higher-paying and year-round positions for females and minorities is achieved. It further provides for some $5 million in monetary relief to compensate victims of past discrimination as well as to pay for future affirmative action obligations.

The approval of the settlement as fair, reasonable, and adequate culminated a series of proceedings conducted according to Section 1.46 of the Manual for Complex Litigation. During this process the primary voice of opposition to the settlement came from certain applicants for intervention (Intervenors). The Intervenors were separate groups of individuals, members of the affected class, who had moved to intervene in the instant action on April 28, 1975, and on June 13, 1975, for the purpose of contesting various aspects of the setttlement agreement and challenging its overall adequacy.

Between the time of the application for intervention and the conclusion of the hearings on the adequacy of the settlement in March, 1976, the Intervenors were granted full rights to participate in the proceedings. A final ruling on the motions to intervene was continued pending the outcome of the hearings.

During the course of the action, the Court noted that the advocacy of counsel for the Intervenors was most helpful in framing the issues and in bringing to the Court's attention many matters worthy of attention in this exceedingly complex case. The Court also noted that the settlement was modified a number of times, in large part due to the unremitting assault of the Intervenors to certain provisions of the settlement, as well as to the statesmanlike approach of the parties to the agreement in dealing with the Intervenors' objections. As a result, the settlement in its final form was far more equitable than as originally proposed. Although the Court eventually found that the asserted defects in the settlement raised by the Intervenors did not destroy its overall reasonableness and adequacy, the Court is convinced that the modifications made in the settlement at the instigation of the Intervenors significantly contributed to the Court's ultimate approval of the settlement package.

The Intervenors now move the Court for an order awarding them attorneys' fees and costs incurred in litigating the adequacy of the settlement. Given the role of the Intervenors in this action, the motion presents novel issues concerning the award of attorneys' fees in a settled employment discrimination suit. Accordingly, for the reasons hereinafter set forth, I hold that an award of fees and costs to the Intervenors is appropriate in this case under both a "common benefit" rationale and the statutory authority of Title VII, 42 U.S.C. §2000e-5(k).

I.

The Court first notes that a number of significant amendments and clarifications of the settlement agreement made during the course of the proceedings were responsive to the objections of the Intervenors. First, the definition of "plant seniority" was clarified to make it clear that every class member could utilize plant seniority in bidding for all high-bracket jobs during the term of the settlement. Without this clarification, the settlement agreement appeared to provide for the attachment of plant seniority only after a class member had attained a high-bracket job. Second, the agreement was revised to call for the elimination of the so-called "incumbency rule", which may have acted as a barrier to upward mobility to class members in the past, in all high brackets. Third, the defendants agreed to post notices of all high-bracket jobs which become available at the beginning of each processing season and to accept applications for these jobs from class members. Fourth, the agreement was clarified to indicate that as much as $4.9 million of the Affirmative Action Fund would be available for the payment of back-pay claims. Further, the defendant employers made a commitment to fulfill their affirmative action and training obligations even if more than $5 million were required to carry them out. Fifth, the agreement was clarified to specify that the promotion goals established in the settlement applied to each high bracket. Sixth, the class of persons eligible to obtain the benefits of plant seniority was expanded. Seventh,

the duties of the Conformance Committee were expanded. Eighth, a provision was included calling for the appointment of a class member representative in every cannery by the Director of Affirmative Action to act as a liasion in the dispute resolution process. Finally, the defendant unions undertook to provide their members with translations of pertinent documents. In addition, certain procedural changes in the notification of the class members about the settlement and their rights thereunder were made.

Although the proponents of the settlement attempt to minimize the importance of these changes, the Court considers them to have significantly improved the settlement. The proponents further assert that many of the changes were contemplated, regardless of the objections of the Intervenors. While the modifications may have been induced by a sudden awakening of the proponents to some defects in the original agreement, it is more likely that the Intervenor's forceful objections and the Court's concern over these points prompted further review of the terms of the agreement. *See, Fogg v. New England Telephone and Telegraph Co.,* 346 F.Supp. 645 (D. N.H. 1972).

II.

The Court finds that the contributions of the Intervenors to the final settlement warrant an award of attorneys' fees under the "common benefit" theory. The "common benefit" theory is an exception to the "American Rule" that the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys'

fee from the loser in the absence of statutory authorization or contract. *See, Aleyska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975). It applies in cases where the litigation confers a substantial benefit upon an ascertainable class, and where the court's jurisdiction over the subject matter of the lawsuit makes it possible to make an award. *See, Hall v. Cole,* 412 U.S. 1, 5 (1973).

In *Hall* the Court affirmed an award of attorneys' fees to a union member who prevailed on a claim against his union that he had been denied free speech rights protected by the so-called "Union Members' Bill of Rights". 29 U.S.C. §411. The Court found that in vindicating his own free speech rights, the plaintiff had necessarily rendered a substantial service to his union as an institution and to all its members. *Hall v. Cole, supra,* at 8.

The "common benefit" theory has met with judicial approval in a variety of circumstances, regardless of whether the action settled or proceeded to judgment or whether the benefits conferred were monetary or otherwise. *See, e.g., Kopet v. Esquire Realty Co.,* 523 F.2d 1005 (2d Cir. 1975); *Yablonski v. United Mine Workers of America,* 466 F.2d 424 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 918 (1973); *Miller v. Carson,* 401 F.Supp. 835 (M.D. Fla. 1975); *Blankenship v. Boyle,* 337 F.Supp. 296 (D.D.C. 1972).

Particularly persuasive is Judge Weigel's decision in *Tenants and Owners in Opposition to Redevelopment (TOOR) v. United States Department of Housing and Urban Development (HUD),* No. C-69-324

SAW (N.D. Cal., Jan. 30, 1974). In *TOOR,* plaintiffs sought to enjoin the San Francisco Redevelopment Agency and HUD from proceeding with a large urban renewal project until applicable federal laws concerning the relocation of area residents had been complied with. The parties to the action reached a settlement protecting the rights of the affected residents. Thereafter, plaintiff moved for an award of attorneys' fees. Judge Weigel held that the "common benefit" theory justified an award of fees as against the San Francisco Redevelopment Agency. His comments are relevant to the case at bar:

> "Defendants argue that the settlement agreement precludes an award of fees because neither party prevailed in the litigation. This argument completely misconstrues the * * * common benefit doctrine[s]. * * * fees are not awarded because plaintiffs prevailed in a technical sense. *They were awarded because plaintiffs successfully enforce rights important to those benefitted.* By their suit in this case, plaintiffs halted violations of * * * [federal law]. The settlement producing these results was the direct consequence of their persistent and effective prosecution of the litigation." *Id.* at 5-6 (emphasis added).

TOOR also belies the proponents' arguments here that the common benefit theory may only be employed where the court can spread the costs of litigation among the benefited class. While this is generally the case, it is certainly not an absolute rule. *See, Brewer v. School Board of Norfolk,* 456 F.2d 943 (4th Cir. 1972), *cert. denied,* 406 U.S. 933 (1972); 6

J. Moore, *Federal Practice,* ¶54.77[2] at 1707-1708 (2d ed. 1975).

It is, of course, true that the authority of a trial judge to award attorneys' fees has recently been circumscribed by the Supreme Court in *Aleyska Pipeline Service Co. v. Wilderness Society, supra.* There the Court held that prevailing parties in federal litigation could not recover attorneys' fees from the loser based on the "private attorney general" exception to the "American Rule". However, it is clear that the common benefit exception to the general rule that each litigant must bear his own attorneys' fees has survived the demise of the private attorney general theory. *Aleyska Pipeline Service Co. v. Wilderness Society, supra,* 420 U.S. at 257-258; *Miller v. Carson, supra,* 401 F.Supp. at 848-850.

III.

In addition to the "common benefit" theory, the Court finds an award of attorneys fees and costs is appropriate in this case under Title VII of the Civil Rights Act of 1964. 42 U.S.C. §2000e *et seq.* As part of Title VII Congress conferred upon the district courts discretion to award reasonable attorneys' fees to the party who prevails in an employment discrimination suit:

> "In any action or proceeding under this subchapter the Court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private party." 42 U.S.C. §2000e-5(k).

To be entitled to an award of fees under this section, the Intervenors must overcome two hurdles. First, it must be established that they are "parties" within the meaning of the statute. Second, they must demonstrate that they "prevailed". I find that they have satisfied both these requirements.

In this case, the Intervenors were neither named plaintiffs nor defendants and, at the conclusion of the hearings on the adequacy of the settlement, the Court denied the motions to intervene on the grounds that the requirements of Rule 24 of the Federal Rules of Civil Procedure had not been satisfied. Although they might have lost this battle, they won the war. Intervenors participated fully in the proceedings regarding the approval of the settlement. They were entitled to notice, given discovery rights, and were required to appear. They presented evidence at the hearings, conducted cross-examination, and filed voluminous briefs and other papers with the Court. Indeed, the extent of their participation was no different from that of any official "party". The Court further notes that the Intervenors have filed a notice of appeal.

Almost one hundred years ago the Supreme Court recognized that persons may acquire the status of parties to a suit after having filed leave to intervene, where they have acted or been treated as parties in the proceedings in the case, even though no formal order admitting them appears in the record. *Ex parte Cutting,* 94 U.S. 14, 20-21 (1877). Indeed, in the broadest sense, the work "party' includes one concerned with, conducting, or taking part in any proceeding,

whether or not he is named as a formal party. *Fong Sik Leung v. Dulles,* 226 F.2d 74, 81 (9th Cir. 1955) (concurring opinion, Boldt, J.).

Accordingly, the Court is satisfied that the Intervenors may be deemed "parties" in this action, notwithstanding the ultimate denial of their motion to intervene.

Moreover, the Court finds that the Intervenors have "prevailed" in securing substantial benefits to the affected class. In any settlement or conciliation such as the instant action, the definition of "prevailing" must be based upon the substantial results achieved, not upon the technical concept of obtaining a judgment or "winning" a motion or verdict. *See, Tenants and Owners in Opposition to Redevelopment (TOOR) v. United States Department of Housing and Urban Development (HUD), supra;* 6 J. Moore, *Federal Practice,* ¶54.77[2] at 1708 (2d ed. 1975); *see also, Parker v. Matthews,* 44 U.S.L.W. 1167 (D.D.C. April 1, 1976).

Attorneys fees have been awarded in Title VII suits in numerous cases where the litigation has resulted in benefits to the affected class, even when named plaintiffs have failed in their individual claims. In *United States v. Operating Engineers, Local Union No. 3,* 6 EPD ¶8946 (N.D. Cal. 1973), fees were awarded to an individual plaintiff even though the government carried the major burden of the litigation since the plaintiff had instigated the lawsuit and thereby had a "salutory effect" upon the defendant by encouraging the fulfillment of congressional aims. Fees were also

awarded in *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970), although an individual plaintiff was unsuccessful in his claim of discrimination, and injunctive relief for the class he represented was deemed unwarranted in light of the employer's voluntary adoption of an affirmative action program. Nevertheless, the court felt that an award of fees was appropirate since the institution of the action served as a "catalyst" in prompting the defendant to implement nondiscriminatory employment policies. Similarly, in *Fogg v. New England Telephone & Telegraph Co., supra,* an unsuccessful individual claimant was awarded fees because she performed a valuable public service in bringing the suit and in prompting the employer to increase the number of class members promoted.

In light of these authorities, the Court believes that the Intervenors here may be deemed to have "prevailed" within the meaning of the applicable statute. Accordingly, the Court holds that the Intervenors are entitled to recover reasonable attorneys' fees and costs under Title VII.

IV.

Having established the right to the Intervenors to recover fees, the Court must now determine the appropriate amount. The proper factors to consider when setting attorneys's fees in a Title XII case were set forth in detail in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir 1974); *see also, Schaffer v. San Diego Yellow Cab Co.*, 462 F.2d 1002 (9th Cir. 1972); *Brandenburger v. Thompson,* 494 F.2d 885 (9th Cir. 1974).

The factors cited in *Johnson v. Georgia Highway Express, Inc., supra,* as those which should be considered in evaluating Intervenors' request for attorneys' fees are:

1. The time and labor required;
2. The novelty and difficulty of the questions;
3. Skill requisite to perform the legal services properly;
4. Preclusions of other employment by the attorney due to acceptance of the case;
5. The customary fee;
6. Whether the fee is fixed or contingent;
7. Time limitations imposed by the client or circumstances;
8. The amount of money involved and the results obtained;
9. The experience, reputation, and ability of the attorneys;
10. The "undesirabiliy" of the case;
11. The nature and length of the professional relationship with the client; and
12, Awards in similar cases.

Assessing the requests and affidavits presented by the Intervenors in connection with their motion in light of these factors, the Court finds that an award of $35,000 in attorneys' fees plus costs is appropriate. The fact that certain of the counsel for the Intervenors are employed by a nonprofit corporation organized for the purpose of providing legal services to

the poor does not detract from the right of such counsel to receive an award of fees for their work in behalf of the benefited class. *Brandenburger v. Thompson, supra; see also, LeBlanc v. Director,* 49 Cal.App.3d 211, 122 Cal.Rptr. 408 (1975). The Court determines that this award shall be assessed only as against the employer defendants and their industry-wide collective bargaining agent. Such an allocation is within the discretion of the Court. *See, Barrett v. W. T. Grant Co.,* 518 F.2d 543, 550 (4th Cir. 1975).

Accordingly, IT IS HEREBY ORDERED that the motion of Intervenors for an award of attorneys' fees and costs is GRANTED in the amount of $35,000 and costs, taxed according to applicable law.

Dated: July 15, 1976.

/s/ William H. Orrick
William H. Orrick
United States District Judge

Appendix E

United States District Court
Northern District of California

No. C-73-2153 WHO

Maria Alaniz, et al.,
Plaintiffs,
vs.
California Processors, Inc., Walnut Creek, Ca., et al.,
Defendants.

[Filed Nov. 11, 1976]

OPINION

On April 1, 1976, this Court approved a settlement in this class action employment discrimination suit affecting employment practices in the food processing and canning industry in Northern California. The Settlement Agreement and Consent Decree (the Decree), effective June 15, 1976, altered seniority, job bidding, and job-training procedures within the industry and established other mechanisms intended to achieve the basic objective of opening up higher-paying and year-round positions for female and minority group workers.

Before the Court is a motion to modify the Decree in several respects, the most important of which is to recognize seniority "according to each employee's most recent seasonal seniority date". Also before the Court is a motion to intervene on behalf of eighteen Anglo males. For the reasons hereinafter stated, the motion to modify the Decree is granted effective September 29, 1976, and the motion to intervene is denied.

I.

Preliminarily, it is appropriate to review the procedural posture of the case. This action was filed December 3, 1973, by the plaintiffs, representing a class of female and minority workers. The action, brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. §1981, charged the employers, who own and operate some seventy-four food processing and canning plants in Northern California, and the unions, who represent the employees in said plants, with discriminating against the plaintiffs and the plaintiff class by denying females and minority group members opportunities to obtain higer-paying and year-round positions within the canning industry. In 1974, conciliation negotiations were conducted with the Equal Employment Opportunity Commission (EEOC). These negotiations culminated in an agreement on February 19, 1975, and on June 20, 1975, all parties to the agreement filed it with the Court and requested, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, that notice of the proposed settlement be sent to the settlement class.

Several groups of individuals (the Intervenors), members of the purported class, filed motions to intervene on April 28, 1975, and on June 13, 1975. During the hearings held with respect to the fairness of the agreement over a period of six days the Intervenors were allowed to participate fully. As a result of their participation, the agreement was drastically altered.

At the end of the hearings, the Court found the agreement, as altered, to be fair, reasonable, and adequate and certified an industry-wide class consisting of all present, past, future, and potential bargaining unit employees and applicants for employment of member companies of California Processors, Inc. (CPI) who were Blacks, Asian-Americans, Native Americans, Spanish-Surnamed Americans, or females. The Court then denied the motions to intervene. The Intervenors filed a notice of appeal which has now been withdrawn.

The central feature of the Decree was the introduction of a "plant seniority" system for class members. Under the Decree, all class members could utilize plant seniority, that is, the earlier of their regular or seasonal seniority date, for job bidding purposes, including bidding during the "rack-up" of jobs at the beginning of the processing season. However, the utilization of plant seniority for layoff and other purposes was limited to those class members who had attained a high-bracket job since July 2, 1965, or who attained such a job under the life of the Decree.

Based upon their experience in implementing the Decree, the parties to the agreement now move the Court to approve certain modifications of the Decree.

II.

A.

The principal modification of the Decree agreed to by the parties provides that "all employees' seniority shall be recognized according to each employee's most recent seasonal seniority date". This change means that all employees, including nonclass members, would be arranged on a seniority list in order of seasonal seniority. It should be noted that employees become "seasonal" after thirty days and attain "regular" status after 1400 hours of work in a calendar year. Accordingly, employees attain "seasonal" seniority before achieving regular status. The change makes the new seniority available to all employees, be they members of the affected class or not, for purposes of job bidding, layoff and recall, and other rights determined by seniority.

Across-the-board plant seniority for all purposes is not new to this litigation. The concept was urged by the Intervenors during the course of the hearings on the fairness and adequacy of the settlement agreement. At that time, the parties to the agreement opposed the idea because it conflicted with a provision of the collective bargaining agreement under which an employee who refused to do available work for which he or she had the seniority and qualifications suffered a complete loss of seniority. Thus, the pro-

ponents of the settlement then argued that if plant seniority were granted to class members for all purposes, large numbers of workers who only desired to work during the season would be placed in line for regular jobs continuing after the season and would be forced to accept such employment or lose seniority rights. However, this major impediment to the simplified, across-the-board plant seniority concept has now been removed. Under the change, the union and the company shall institute an industry-wide, standardized, neutral "waive-off policy.[1] Thus, seasonal workers will be protected from forced seniority loss under the proposed change.

During the course of the hearings, it was argued that the implementation of the two-tiered plant seniority system urged by the proponents and approved under the Decree would not be sufficient to afford all class members their "rightful place" in the cannery work force. In particular, it was pointed out that the Decree did not confer the full benefits of plant seniority upon class members who attained a high-bracket job *prior* to July 2, 1965, or to those class members who never attained a high-bracket position. While recognizing this fact, the Court noted that a *settled* action may still be approved even if it arguably falls short of achieving for each affected discrimi-

[1]Although the formal details of this "waive-off" policy are still being ironed out by the parties, the functional outlines of the system have been made clear to the Court. Under the uniform "waive-off" system, essentially seasonal workers will be able to "waive" or decline, *without loss of plant seniority*, more regular, year-round job openings for which plant seniority has suddenly made them available.

natee his or her "rightful place" in the seniority system. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 850 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (U.S. Apr. 19, 1976).

Now, however, under the modification of the Decree the affected class is much closer to the achievement of the "rightful place" standard. The proposed seniority modifications significantly improve the relative seniority status of females. Consequently, the seniority status of males, including minority males, may suffer, at least in terms of the assignment of seniority numbers. Overall, minorities as a class will not suffer adverse consequences.[2]

B.

No specific findings of discrimination have heretofore been made in this case. The propriety of granting affirmative relief, including class-wide seniority adjustments, in the context of a settled employment discrimination suit where there has been no judicial finding or admission of past discrimination, has yet to be definitively resolved. The uncertainty of this difficult legal and troubling social issue was recently noted by Judge Gesell in *McAleer v. AT&T*, 12 EPD ¶10,994 (D.D.C. June 9, 1976).

[2]The evidence adduced at the hearings on the fairness and adequacy of the settlement indicated that women were substantially underrepresented in the high-bracket jobs and regular jobs. Minorities as a group were also underrepresented. Evidence as to the effects of any affirmative action program upon minority males was also introduced.

However, in *EEOC v. AT&T*, 12 EPD ¶11,160 (E.D. Pa. Aug. 20, 1976), Judge Higginbotham ruled that a consent decree embodying goals, quotas, timetables, and seniority adjustment to implement an affirmative action program was lawful, notwithstanding the absence of a finding or admission of past discrimination. Judge Higginbotham said that to require such a predicate to an affirmative action program would contravene Congress' clear intent that Title VII suits should be settled, not litigated.

It is not necessary to follow the *AT&T* case here since the evidence adduced at the hearings provides ample support for a *prima facie* finding of discrimination sufficient to warrant the seniority adjustments and other affirmative relief in this case. The seniority adjustments, including the modification calling for across-the-board plant seniority are designed to aid those who have been the victims of past discrimination. The propriety of such affirmative relief to redress past discrimination is clear, even in an industry with many temporary employees. *Patterson v. Newspaper & Mail Deliveries Union*, 514 F.2d 767 (2d Cir. 1975).

At the hearings previously conducted in this case, the Court also heard testimony on the effects of the settlement agreement upon nonclass members, including Anglo males. The Ninth Circuit clearly mandates that district courts consider the effects of any seniority adjustments on nonclass members in fashioning remedies under Title VII. *United States v. Navajo Freight Lines*, 525 F.2d 1318 (9th Cir. 1975); *Man-*

dujano v. Basic Vegetable Products, Inc., 12 EPD ¶11,178 (9th Cir., Aug. 27, 1976). Based upon the evidence presented, this Court concluded that the settlement did not contravene *Navajo Freight* by allowing "bumping" of nonclass members.

Across-the-board use of "seasonal seniority dates" by all employees is a better accommodation of the competing interests at stake here. The Supreme Court recently reaffirmed that Title VII protects whites as well as minorities, and presumably men as well as women, from discrimination in employment. *McDonald v. Santa Fe Trail Transportation Co.*, 44 U.S.L.W. 5067 (U.S. June 25, 1975). However, in *McDonald* the Court specifically declined to consider whether a remedial preference pursuant to an affirmative action program was unlawful. But, the Court recently made clear that it is proper to award retroactive seniority benefits to the victims of discriminatory employment practices even though such relief may conflict with the expectations of other, arguably innocent, employees. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

The Court believes that the Decree as modified effectuates the remedial purposes of Title VII while at the same time it avoids the establishment of a seniority system which might put some nonclass members (Anglo males) at an unwarranted disadvantage and, thus, the Decree more fully comports with the requirements of *Navajo Freight, Franks,* and *McDonald.*

C.

The parties also seek modifications concerning the dissemination of information about the Decree to the work force. They propose the publication of certain written materials as well as at least one meeting per plant to explain the Decree. The Court believes that the holding of one mass meeting is *not* a very effective way to explain the Decree. A series of three to five meetings per plant should be held in addition to the dissemination of written materials. Accordingly, the Court approves the proposed modifications.

III.

The Decree settling the action filed December 3, 1973, was approved on April 1, 1976, and became effective June 15, 1976. The entry of the Decree and the implementation of the seniority adjustments pursuant thereto are now attacked by eighteen named individuals, purporting to represent a class of bargaining unit employees in the canning industry who at this late date move to intervene. They claim that the implementation of the Decree adversely affects their employment status and unlawfully discriminates against them on the basis of race, sex, national origin, and color in violation of Title VII. Other violations of various federal labor laws are also alleged. Without specifying whether they wish to enter the lawsuit as plaintiffs or defendants, they seek leave to intervene under Rule 24 of the Federal Rules of Civil Procedure for the purpose of contesting the validity of the Decree. Eight of the applicants are white males,

five are minority males, and five are females. The applicants pray for relief from the judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Alternatively, they seek a stay of the Decree under Rule 62 of the Federal Rules of Civil Procedure pending appeal.

The requisites for intervention under Rule 24(a) indicate that upon timely application, a person should be permitted to intervene as a matter of right when (a) the applicant claims an interest in the subject matter of the action, and (b) he is so situated that the disposition of the action may as a practical matter impair his ability to protect his interest, unless the applicant's interest is adequately represented by existing parties.

As Professor Moore notes, intervention after judgment is unusual. However, it may be granted where it is the only way to protect the intervenor's rights, *e.g.*, where he is a member of the class on whose behalf the action was originally filed, and would be bound by the judgment, but the party purporting to represent him does not or cannot pursue an appeal. 3B Moore, *Federal Practice,* ¶24.13(1) at 24-256 *et seq.*; *Pelligrino v. Nesbit,* 203 F.2d 463 (9th Cir. 1953).

Intervention after the entry of a consent decree has been permitted in employment discrimination suits to allow those who claim to be adversely affected by the decree to have their say as to the propriety of the relief. *United States v. Allegheny-Ludlum Industries, Inc.,* 63 F.R.D. 1 (N.D. Ala. 1974), *aff'd* 517 F.2d 826 (5th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3593 (U.S. Apr. 19, 1976); *EEOC v. AT&T,* 506 F.2d 735 (3d Cir. 1975).

However, this motion is untimely. Intervention may appropriately be denied where the intervenors knew or reasonably should have known of their rights long before making application and slept on them. *See EEOC v. AT&T,* 365 F.Supp. 1105 (E.D. Pa. 1973), *aff'd in part and rev'd in part,* 506 F.2d 735 (3d Cir. 1975); *SEC v. Bloomberg,* 299 F.2d 315 (1st Cir. 1962).

Here, this litigation was well publicized and continued for several years. Six days of hearings were conducted on the fairness of the Decree. Under the Court's supervision, the defendants sent out over 150,000 notices of the hearings on the fairness of the settlement, published notices in plants and in newspapers where the canneries were located. As Judge Trask recently noted in his dissent in *Mandujano v. Basic Vegetable Products, Inc., supra,* 12 EPD ¶11,178 at 5423:

> "* * * It is difficult to believe that over the protracted period of discussion, negotiation, and hearing and the comprehensive posting and publication, the Anglo male employees would not have known of the problem or taken an interest in the settlement if it appeared to be prejudicial to their interests."

Some of the purported Intervenors are class members, who are bound by the Decree. They had the opportunity to opt out and/or to present their objections at the extensive hearings conducted in this

case. The Court notes that the procedures followed in this case comport with the requirements for allowing full consideration of Title VII settlements only recently mandated by the Ninth Circuit in *Mandujano.*

This Court has adequately considered the effect of the Decree on nonclass members as required by *Navajo Freight* and *Mandujano.*

Moreover, the nonclass members were adequately represented by the union defendants in this case. Here, the union was a defendant and participated in the fashioning of the Decree.

The motion for modification of the Decree is GRANTED, and the motion for leave to intervene is DENIED.

Dated: November 9, 1976.

/s/ William H. Orrick
William H. Orrick
United States District Judge